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IN THE OFFICE OF THE CLERK  
**Supreme Court of the United States**

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SCOTT DAVID BOWEN,  
*Petitioner,*

v.

STATE OF OREGON,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
Oregon Court of Appeals

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott David Bowen respectfully petitions for a writ of certiorari to the Court of Appeals of Oregon in *State v. Bowen*, No. A129141.

### OPINIONS BELOW

The pertinent opinion of the Court of Appeals of Oregon is reported at 215 Or. App. 199, 168 P.3d 1208 (2007), and is reprinted at App. 5a-8a. The Oregon Supreme Court's order denying review of that decision is reported at 197 P.3d 1104 (2008), and is reprinted at Pet. App. 8a.

### JURISDICTIONAL STATEMENT

The judgment and opinion of the Oregon Court of Appeals was entered on September 26, 2007. The Oregon Supreme Court denied review of this decision on November 5, 2008. Pet. App. 8a. Justice Kennedy extended the time in which to file this petition until March 4, 2009. See Application 08A543. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Oregon Constitution, Article I, section 11, provides, in part:

In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict . . . .

Oregon Revised Statutes, § 136.450, provides:

"(1) Except as otherwise provided in subsection (2) of this section, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors."

## STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: namely, whether a jury may convict a defendant of a felony based on a less than unanimous jury verdict. Thirty-six years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions with less than unanimous verdicts. Subsequent legal developments and academic studies call this result into serious question.

1. Oregon law provides, with the sole exception of first degree murder, that the State need persuade only ten of the twelve jurors to vote guilty in order to secure a conviction in a criminal case. OR. REV. STAT § 136.450 (2007). Oregon is one of only two states in the country (the other being Louisiana) that has such a rule.

2. In 2003, petitioner's fifteen-year-old daughter, who court papers refer to as "complainant," ran away from home. Oregon police officers were notified that she was a runaway, and they eventually found her and tried to take her back to petitioner's (and his wife's) home. Complainant, however, resisted, claiming that she was not "any more safe here than I am out there." Upon being pressed as to what that meant, complainant told officers that petitioner had

sexually abused her several times over the past decade. She was unable to pinpoint how old she was when any of the particular events she described allegedly occurred; she estimated the dates within two or three year periods.

The State charged petitioner with five counts of first-degree sexual abuse, two counts of first-degree sodomy, and one count of first-degree rape, all alleged to have occurred between December 30, 1991, and December 4, 2002. Pet. App. 2a-3a. The State did not uncover any physical evidence of these alleged crimes. Instead, the State's charges rested on complainant's accusations. Petitioner disputed the accusations in their entirety, claiming that she had fabricated them in order to gain independence from him and his wife. Accordingly, the prosecution's case turned entirely on credibility issues.

At trial, Petitioner requested a jury instruction requiring a unanimous verdict to convict him of the charges. Pet. App. 5a. Petitioner argued for this instruction on the basis of *Blakely v. Washington*, which recently described the unanimous-jury-conviction requirement as one of the "longstanding tenets of common-law criminal jurisprudence." 542 U.S. 296, 301 (2004). The trial court rejected petitioner's proposed instruction, stating that this language in *Blakely* was mere "dicta," and that "the issue of whether 12 are required in every case was not squarely before the [*Blakely*] court." Pet. App. 7a.

The jury found Petitioner guilty on all eight charges. Pet. App. 3a. Polling revealed that the jury divided 10-2 on each one of the counts. The trial court sentenced petitioner to over seventeen years in prison.

3. The Oregon Court of Appeals affirmed petitioner's conviction, rejecting his argument that it was unconstitutional to convict him of a crime through a non-unanimous verdict. Relying on this Court's 4-1-4 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), the appellate court held that "the permissibility of less-than-unanimous jury verdicts under Article I, section 11, [does] not violate the Sixth Amendment to the United States Constitution." Pet. App. 7a.

4. Petitioner sought discretionary review in the Oregon Supreme Court, arguing that convicting him by a non-unanimous jury instruction violated the Sixth and Fourteenth Amendments. The Oregon Supreme Court denied discretionary review without comment. Pet. App. 8a.

### REASONS FOR GRANTING THE WRIT

Oregon is one of two states that allows a person to be convicted of a felony by a less than unanimous jury verdict. (Louisiana is the other. See La. C. Cr. P. Art. 782.) This practice contravenes centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases. Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a

deeply fractured, internally contradictory decision – held that the Constitution does not forbid Oregon and Louisiana from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence call the result in *Apodaca* into serious question. The two opinions that comprise the five-vote judgment in *Apodaca* use constitutional methodologies that this Court has since abandoned. Worse yet, the result in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts that the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England \*343 (1769)); accord *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Yet the Oregon and Louisiana state courts have concluded that they are powerless to effectuate *Apodaca*'s demise. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should exercise that prerogative now. *Stare decisis* has limited force in this case and the constitutional right at stake is enormously important. Furthermore, as Justice (then Judge) Kennedy has explained:

The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

*United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). This Court should not allow this fundamental and time-honored protection to be denied any longer.

**I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.**

**A. This Court's Recent Jurisprudence Has Severely Undercut its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unanimous Verdicts.**

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's recent Sixth and Fourteenth Amendment jurisprudence demonstrates that the two have become irreconcilable.

**1. *Apodaca v. Oregon***

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may

convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States*, 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted *Commentaries* that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, *Commentaries on the Constitution* § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher*, 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality

asserted that instead of following history, “[o]ur inquiry must focus upon the *function* served by the jury in contemporary society.” *Id.* at 410 (emphasis added). After identifying the jury’s function as interposing “the commonsense judgment of a group of laymen” between the accused and his accuser, the plurality found that “[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.” *Id.* at 410-11 (quotation omitted).

Second, in response to *Apodaca*’s argument that the Sixth Amendment requires jury unanimity in part “to give effect of the reasonable-doubt standard,” the plurality asserted that “the Sixth Amendment does not require proof beyond a reasonable doubt at all.” *Id.* at 412. “We are quite sure,” the plurality emphasized, “that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases.” *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion in *Apodaca* and a companion case, Justice Powell stated that he believed, “in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial.” *Johnson v. Louisiana*, 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality’s “major premise” that “the concept of jury trial, as applicable

to the States under the Fourteenth Amendment, must be identical in every detail to the concept required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson*, 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] underst[anding] that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson*, 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*],

when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

*Johnson v. Louisiana*, 406 U.S. at 395 (Brennan, J., dissenting).

## 2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. While the *Apodaca* plurality focused “upon the function served by the jury in contemporary society,” 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes but rather from the original understanding

of the guarantees contained therein. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 128 S. Ct. 2678 (2008), this Court continued that trend, explaining that “[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court’s views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen.” *Id.* at 2692. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have “abstract[ed] from the right to its purposes” and left it to this Court whether to give effect “to the details.” *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the “practice” of trial by jury as it existed “at common law.” *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant’s potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that “[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.” *Blakely v. Washington*, 542 U.S. 296, 313

(2004). Rather, the controlling datum is “the Framers’ paradigm for criminal justice.” *Id.*

This pronounced shift in constitutional methodology itself – the return to historical analysis – calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the “longstanding tenets of common-law criminal jurisprudence” that the Sixth Amendment embodies include the rule “that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.’” *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, *Commentaries on the Laws of England* \*343 (1769)). This Court further explained in *Booker v. United States*:

More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:

“[T]he historical foundation for our recognition of these principles extends down centuries into the common law. ‘[T]o guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘as the great bulwark of [our] civil and political liberties,’ trial by jury has been understood to require that ‘*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous*

suffrage of twelve of [the defendant's] equals and neighbours . . . .”

543 U.S. 220, 238-39 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges against the accused must be determined “beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*”) (emphasis in original).

The *Apodaca* plurality’s functional view of the Sixth Amendment cannot be squared with these repeated, historically based pronouncements.

b. This Court similarly has disregarded the *Apodaca* plurality’s assertion that “the Sixth Amendment does not require proof beyond a reasonable doubt at all.” 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

*Sullivan*, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – another case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

c. Justice Powell's non-incorporation analysis cannot withstand scrutiny either. Even when *Apodaca* was decided, Justice Powell's notion of applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting

*Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Sixth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz*, 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

The *Crist* case, decided thirty years ago, dispensed with any possibility of Justice Powell's views ever gaining sway on this Court. "In the years since *Crist*, . . . [n]o member of the Court has suggested . . . that [a] particular requirement might not be constitutionally demanded for state proceedings while constitutionally mandated in federal proceedings. . . . Thus, absolute parallelism seems to be a settled principle." Wayne R. LaFare et. al, *Criminal Procedure* § 2.6(c), at 67-68 (4th ed. 2004).

This Court's modern Sixth Amendment decisions are fully consistent with this observation. In *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right

to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford*, 541 U.S. 36; *Davis v. Washington*, 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton*, 535 U.S. 654 (2002); *Strickland v. Washington*, 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.<sup>1</sup>

Even if the question here were still fundamentally considered one of due process, Justice Powell's analysis would contradict this Court's modern case law. Justice Powell approached the incorporation in *Apodaca* as depending on a "fresh look" at what elements of the right to jury trial are essential. 406 U.S. at 376. This Court, however, has made clear in recent decisions that due process does not depend upon the subjective views of individual Justices regarding the importance or desirability of given practices. Rather, the "crucial guideposts" in due process cases are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation

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<sup>1</sup> To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington*, 369 U.S. 541, 545 (1962); *Hurtado v. California*, 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca* stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner, or with the same force, as in federal trials.

omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (due process requires adherence to rights that are “deeply rooted in this Nation’s history and tradition”). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, “unanimity had long been established as one of the attributes of a jury conviction.” *Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

**B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.**

For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court’s reconsidering the result in *Apodaca* in light of this Court’s recent approach to the Sixth Amendment.

1. Principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had “expressly disagreed with the rationale of the plurality.” *Id.* at 66.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca*, therefore, is entitled only to "questionable precedential value." *Seminole Tribe*, 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon*, 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from

precedent); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra*, at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations also wane considerably “in cases . . . involving procedural and evidentiary rules,” in part because such rules generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-seven years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers, in exactly the same position as they were in 1972. And no other constitutional doctrine or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court’s constitutional criminal-procedure jurisprudence.

**C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.**

1. Empirical research conducted since *Apodaca* confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate.

a. The *Apodaca* plurality defended its decision in part based on an assumption that a unanimity requirement “does not materially contribute to the

exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality hypothesized:

[W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

*Id.* at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century reveals that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials*, at 24, available at [http://www.abanet.org/jury/pdf/final%20commentary\\_july\\_1205.pdf](http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf) (last accessed February 27, 2009). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

The Arizona jury deliberations reveal that some of the claims made in favor of dispensing

with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.

The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006). Other scholars have reached similar conclusions. See Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to

alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, *The Jury in America* 81 (1988) (finding that non-unanimous juries correct each other's errors of fact less frequently than do juries required to reach unanimity).

b. The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See Principles for Juries and Jury Trials, supra*, at 24. Empirical studies corroborate the observation that jurors who have divergent views contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., *Inside the Jury* 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See Kim Taylor-Thompson, Empty Votes in*

*Jury Deliberations*, 113 HARV. L. REV. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that “[a] unanimous decision should be required in all criminal cases heard by a jury.” *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing non-unanimous verdicts have a significant effect when prosecution’s case “is not particularly weak or strong”).

c. Finally, Justice Powell rebuffed concerns from the *Apodaca* dissenters that allowing non-unanimous verdicts would weaken the beyond-a-reasonable-doubt rule by asserting “[t]rial judges also retain the power to . . . set aside verdicts once rendered when the evidence is insufficient to support a conviction.” 406 U.S. at 379. Yet the Oregon Supreme Court has now made clear that Oregon trial judges actually lack this power. In the Oregon Supreme Court’s view, setting aside a verdict in such circumstances “would be the equivalent of entering a judgment notwithstanding a verdict, which is not available in criminal proceedings.” *State v. Metcalfe*, 974 P.2d 1189, 1192 (Or. 1999); *accord State v. Peekema*, 976

P.2d 1128, 1132 (Or. 1999); *State ex rel. Redden v. Davis*, 604 P.2d 879, 882-83 (1980). One of the safety nets on which Justice Powell relied in casting his vote, therefore, simply does not exist.

2. The consequences of Oregon and Louisiana continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these states to be convicted by non-unanimous verdicts. Over the past five years alone, the Oregon courts have noted fifteen cases in which defendants were convicted of felonies by non-unanimous verdicts<sup>2</sup> – a number that substantially undercounts the frequency of such verdicts. Juries are not polled as a matter of course in Oregon. Additionally, most Oregon criminal convictions are “affirmed without opinion” by courts of review. Even when Oregon courts do issue opinions, the jury vote is not necessarily reported.

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<sup>2</sup> See Pet. App. 5a; *State v. Camacho-Alvarez*, No. C062071CR, 2009 WL 32522 (Or. App. Jan. 7, 2009); *State v. Cobb*, 198 P.3d 978, 979 (Or. App. 2008); *State v. Jones*, 196 P.3d 97, 104 (Or. App. 2008); *State v. Smith*, 195 P.3d 435, 436 (Or. App. 2008); *State v. Perkins*, 188 P.3d 482, 484 (Or. App. 2008); *Simpson v. Coursey*, 197 P.3d 68, 71 (Or. App. 2008); *Wyatt v. Czerniak*, 195 P.3d 912, 916 (Or. App. 2008); *State v. Cave*, 195 P.3d 446, 448 (Or. App. 2008); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Moller*, 174 P.3d 1063, 1064 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 601 (Or. App. 2007); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. O'Donnell*, 85 P.3d 323, 326 (Or. App. 2004).

During the same period, the Louisiana appellate courts have noted over forty such cases.<sup>3</sup>

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<sup>3</sup> See *State v. Lee*, 964 So. 2d 967 (La. App. 2007), cert. denied, 129 S. Ct. 130 (2008); *State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006); *State v. Davis*, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La. App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Jackson*, 892 So. 2d 71, 73 (La. App. 2004); *State v. King*, 886 So. 2d 598 (La. App. 2004); *State v. Nguyen*, 888 So. 2d 900, 904 (La. App. 2004); *State v. Tauzin*, 880 So. 2d 157, 158 (La. App. 2004); *State v. Shrader*, 881 So. 2d 147, 150 (La. App. 2004); *State v. Williams*, 878 So. 2d 765, 778 (La. App. 2004) (Thibodeaux, J. dissenting); *State v. Guiden*, 873 So. 2d 835, 837 (La. App. 2004); *State v. Brown*, 874 So. 2d 318, 328 (La. App. 2004); *State v. Harris*, 868 So. 2d 886, 890 (La. App. 2004); *State v. Moore*, 865 So. 2d 227, 232 (La. App. 2004).

Defendants repeatedly have challenged the holding in *Apodaca* in recent years, and they continue to do so. But the Oregon and Louisiana intermediate appellate courts continually tell these defendants that only this Court can declare that *Apodaca* is no longer good law, and the Oregon and Louisiana Supreme Courts continue to deny discretionary review of the issue. See Pet. App. 5a-7a, 8a; *State v. Pereida-Alba*, 189 P.3d 89 (Or. App. 2007), *rev. denied*, 197 P.3d 1104 (Or. 2008)<sup>4</sup>; *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. Lee*, 964 So. 2d 967 (La. App. 2007), *writ denied*, 977 So. 2d 896 (La. 2008), *cert. denied*, 128 S. Ct. 130 (2008); *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006), *writ denied*, 964 So. 2d 352 (La. 2007); *State v. Newman*, 2006 WL 3813692, at \*5 (La. App. 2006) (unpublished opinion); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006), *writ denied*, 955 So. 2d 684 (La. 2007); *State v. Juniors*, 918 So. 2d 1137, 1147-48 (La. App. 2005), *writ denied*, 936 So. 2d 1257 (La. 2006), *cert. denied*, 127 S. Ct. 1293 (2007); *State v. Divers*, 889 So. 2d 335, 353 (La. App. 2004), *writ. denied*, 899 So. 2d 2 (La. 2005), *cert. denied*, 546 U.S. 939 (2005); *State v.*

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<sup>4</sup> In *Pereida-Alba*, as in this case, several groups, including the National Association of Criminal Defense Lawyers (NACDL), urged the Oregon Supreme Court to consider this issue. See 2008 WL 4255140 (NACDL brief). The Oregon Supreme Court denied review without comment.

*Sharp*, 810 So. 2d 1179, 1193-94 (La. App. 2002), *writ denied*, 845 So. 2d 1081 (La. 2003). And because the nonunanimity rules in both Oregon and Louisiana are based on state constitutions, defendants cannot seek change on state law grounds.

The time has come for this Court to address the disjunction between *Apodaca* and this Court's more recent, historically grounded, view of the Sixth Amendment. No further percolation will occur in trial or appellate courts. Neither the Oregon nor the Louisiana Supreme Court is willing to confront the issue. Nor is any further empirical research necessary. Two states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so.

#### **D. This Case Is an Ideal Vehicle for Reconsidering *Apodaca*.**

Petitioner is aware that this Court recently denied certiorari in another case presenting this same issue: *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523). This Court did the same in *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449). In *Lee*, a wide array of groups filed *amicus* briefs supporting certiorari: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Charles Hamilton Institute for Race and Justice, and the Federal Public Defender for the

District of Oregon.<sup>5</sup> These groups argued in various ways that condoning non-unanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice.

The strength of the collective plea in *Lee* suggests this is a pressing issue that is not going to go away. And for three reasons, this case presents a better vehicle than *Lee* or *Howard* – indeed, an ideal vehicle – for considering whether our Constitution should continue to tolerate felony convictions by less than unanimous verdicts.

1. This case places the problems associated with allowing less than unanimous verdicts in unusually stark relief. The crimes with which the State charged petitioner, child rape and sexual abuse, are extraordinarily serious – so serious that they may “overwhelm” the judgment of even fair minded jurors. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008). At the same time, “[t]he problem of unreliable, induced, even imagined child testimony means there is a special risk of wrongful [conviction] in some child rape prosecutions” – particularly prosecutions, such as this one, *see supra* at 3-4, that lack physical evidence of guilt and thus depend on the alleged victim for “the central narrative and account of the crime[s].” *Id.* at 2663; *see also Ex Parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. 2005) (Cochran, J., concurring) (explaining that

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<sup>5</sup> Petitioner understands that copies of these briefs remain available in the clerk’s office. They also are available online on the Westlaw page that reports the denial of certiorari in *Lee*.

when child rape prosecutions “are ‘he said, she said’ cases that ultimately rely on the jury’s assessment of the relative credibility of opposing witnesses,” “it is virtually impossible for the jury not to make an occasional credibility mistake”). Consequently, the need at petitioner’s trial for stringent and dependable procedural safeguards was at its zenith.

Yet Oregon’s non-unanimity rule provided petitioner anything but stringent protection. Despite the fact that two jurors (nearly 20% of the jury) concluded that petitioner was not guilty of the charges, the State’s judicial system judged him guilty; sentenced him to over seventeen years in prison; and branded him a “sex offender” for the rest of his life. A Louisiana prosecutor has commented that when ten of twelve jurors find a defendant guilty of a serious crime, “that’s beyond a reasonable doubt.” Marcia Coyle, *Divided on Unanimity*, Nat’l L.J., Sept. 1, 2008, at 1. This Court should promptly rebuke that view, which misapprehends not only legal theory but the “effect” of dispensing with the unanimity requirement “on the fact-finding process.” *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

2. Unlike Mr. Lee, who was under a death sentence in a separate case from the one in which he sought review, see *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536), petitioner would unquestionably benefit from a favorable decision in his case. The jury divided 10-2 on each of the counts involved. And petitioner is not subject to any other judgments or sentences.

3. Finally, this case aptly demonstrates the fact, as indicated above, that non-unanimous verdicts are an unfortunately common occurrence in Oregon and Louisiana. Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty will reign. Better to grant review now and to put the question to rest.

### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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March 4, 2009

## **APPENDIX**

APPENDIX A

COURT OF APPEALS OF OREGON

STATE OF OREGON, Plaintiff-Respondent,  
v.  
SCOTT DAVID BOWEN, Defendant-Appellant.

A129141; 040935242

On Appellant's Petition for Reconsideration  
Feb. 14, 2008

Decided June 11, 2008.

Before HASELTON, Presiding Judge, and  
ARMSTRONG, Judge, and ROSENBLUM, Judge.

HASELTON, P.J.

Defendant petitions for reconsideration in this criminal case, arguing that we erred in rejecting his challenge to consecutive sentences based on the rule of law announced in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that facts used to enhance a penalty for a crime, other than prior convictions or facts admitted by the defendant, must be found by a jury beyond a reasonable doubt. *State v. Bowen*, 168 P.3d 1208 (Or. App. 2007) (relying on *State v. Tanner*, 150 P.3d 31 (Or. App. 2006), *rev. allowed*, 173 P.3d 831 (Or. 2007)).<sup>1</sup>

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<sup>1</sup> We rejected two additional assignments of error raised by defendant. Our disposition of those assignments of error is not at

Defendant notes that, subsequent to our affirmance of his sentence, the Oregon Supreme Court held that the rule of law from *Apprendi* and *Blakely* applied to facts used to support consecutive sentences. *See State v. Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008).

The state, while maintaining that *Ice* was decided incorrectly, acknowledges that *Ice* is controlling here as to the legal principle, but urges this court to nonetheless affirm defendant's sentence on the ground that any error in failing to obtain a jury finding in support of consecutive sentences was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18 (1967). *See Washington v. Recuenco*, 548 U.S. 212 (2006) (*Apprendi* error and failing to submit sentence-enhancement facts to a jury is not "structural error" and is subject to federal harmless-error analysis); *State v. Bray*, 160 P.3d (Or. 2007) (applying federal harmless-error formulation in determining that *Apprendi/Blakely* error was not harmless: "[W]e cannot say that no reasonable juror could draw any conclusion other than [the existence of the enhancing factor] from this record.").

In this case, defendant was charged with five counts of first-degree sexual abuse, ORS 163.427, and one count of first-degree sodomy, ORS 163.405, alleged to have occurred between December 30, 1991 and December 29, 2000. Defendant further was charged with an additional count of first-degree sodomy, as well as first-degree rape, alleged to have occurred

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issue on reconsideration. Accordingly, we adhere to our former opinion with respect to those assignments of error.

between December 29, 2000 and December 4, 2002. A jury found defendant guilty on all charges. Over the defendant's objection that *Blakely* required jury findings in support of consecutive sentences, the sentencing court found that none of the crimes arose from a continuous and uninterrupted course of conduct, ORS 137.123(2), and imposed consecutive sentences on four of the crimes.

On appeal, defendant assigned error to the court's imposition of consecutive sentences, arguing that judicial factfinding in support of consecutive sentences under ORS 137.123(2) runs afoul of *Blakely* and *Apprendi*. As noted, that is correct. *See Ice*, 170 P.3d 1049.

The state responds that the error was harmless beyond a reasonable doubt, because the testimony of the victim of the offenses "clearly established that each of the offenses was a separate incident; that is, they each occurred at different times and at different locations over a period of years." *See generally State v. Cook*, 135 P.3d 260 (Or. 2006) (describing federal constitutional harmless standard).

We agree with the state. A detailed discussion of the facts would be of no benefit to the bench, the bar, or the public. Suffice it to say that the evidence at trial established eight incidents of sexual contact between defendant and the victim, which occurred when the victim was between the ages of approximately six and 15. Those incidents, as demonstrated by overwhelming evidence in the record, were so distinct from one another that we can say with complete confidence that the jury would have found

that the offenses did not occur as part of a continuous and uninterrupted course of conduct if it had been asked to determine that matter. That is, on this record, no reasonable factfinder could have determined otherwise. Accord *Neder v. United States*, 527 U.S. 1 (1999) (determining that failure to submit an element of an offense to the jury was “harmless beyond a reasonable doubt” where “no jury could reasonably find” that the government had failed to prove that element). Accordingly, because the asserted error was harmless beyond a reasonable doubt, we affirm.

Reconsideration allowed; former opinion modified and adhered to as modified.

APPENDIX B

COURT OF APPEALS OF OREGON

STATE OF OREGON, Plaintiff-Respondent,  
v.  
SCOTT DAVID BOWEN, Defendant-Appellant.

040935242; A129141.

Submitted on Record and Briefs  
Aug. 28, 2007

Decided Sept. 26, 2007.

Before HASELTON, Presiding Judge, and  
ARMSTRONG and ROSENBLUM, Judges.

HASELTON, P.J.

Defendant appeals his conviction for multiple felony sex offenses. He assigns error to (1) the denial of his motion for mistrial, (2) the trial court's refusal to instruct the jury that it could convict as to each of the charges only upon a unanimous verdict, and (3) the imposition of consecutive sentences based on judicial findings. We reject the first assignment of error without discussion and the third assignment of error based on the reasoning of *State v. Tanner*, 150 P.3d 31 (Or. App. 2006). For the reasons that follow, we also reject defendant's asserted entitlement to a jury unanimity instruction. Accordingly, we affirm.

Article I, section 11, of the Oregon Constitution provides, in part, that

“in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]”

Notwithstanding that provision, defendant requested that the jury be instructed as follows: “This being a criminal case, each and every juror must agree on your verdict.” Defendant argued, generally, that the instruction comported with – and, indeed, was compelled by – the following observation in *Blakely v. Washington*, 542 U.S. 296, 301 (2004):

“This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,’ 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) \* \* \*.”

The trial court rejected the proposed instruction:

“Yes, I can’t give that. That wouldn’t comply with Oregon law so I’m not going to do that.

“ \* \* \* \* \*

“THE COURT: I don’t think *Blakely* actually speaks to this – *Blakely* wasn’t really a decision that was addressing that special issue. It was addressing, of course, whether

or not a jury should weigh in on factors that related to enhancements of sentencing. \* \* \*

\* \* \* \* \*

"THE COURT: \* \* \* [That statement] is in a sense a form of dicta. In other words, the issue of whether 12 are required in every case was not squarely before the court. And this was a sentence with which I'm familiar because, of course, I'm familiar with *Blakely* \* \* \* but [it's] in the context [of] an entirely different issue.

"I don't read this as a decision by the United States Supreme Court that every state must have \* \* \* unanimous verdicts."

On appeal, defendant reiterates his "jury unanimity" contention. Necessarily implicit in defendant's argument is the premise that the Court's observation in *Blakely* had the effect of overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Apodaca*, the Court held that the permissibility of less-than-unanimous jury verdicts under Article I, section 11, did not violate the Sixth Amendment to the United States Constitution. *Apodaca*, 406 U.S. at 407-14.<sup>1</sup>

Affirmed.

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<sup>1</sup> Very recently, in *State v. Miller*, 166 P.3d 591 (Or. App. 2007), we rejected an unpreserved challenge identical to defendant's, concluding that, given *Apodaca*, the failure to give a "unanimous verdict" instruction was, at the very least, not error apparent on the face of the record.

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**APPENDIX C**

**SUPREME COURT OF OREGON**

**STATE**

**v.**

**SCOTT DAVID BOWEN**

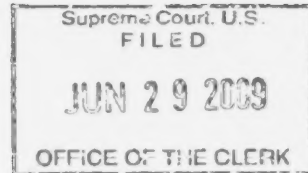
**Nos. A129141, S056298**

**November 05, 2008**

**220 Or. App. 380, 185 P.3d 1129**

**DENIED.**

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No. 08-1117

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# In the Supreme Court of the United States

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SCOTT DAVID BOWEN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

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On Petition for Writ of Certiorari to the  
Oregon Court of Appeals

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BRIEF FOR RESPONDENT STATE OF OREGON IN  
OPPOSITION

---

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## QUESTION PRESENTED

Thirty-seven years ago this Court held, in an Oregon case, that non-unanimous, 11-1 and 10-2 jury verdicts in felony cases do not violate the Sixth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). See also *Johnson v. Louisiana*, 406 U.S. 356 (1972). Since then, Oregon has relied on *Apodaca* to administer Oregon's seventy-five-year-old constitutional provision that permits less-than-unanimous jury verdicts in felony cases other than murder, Or. Const. Art. I, section 11. The question presented is:

Whether this Court should overrule *Apodaca* and hold that the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires jury verdicts in state court felony cases to be unanimous.

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## STATEMENT OF THE CASE

### A. Statement of the Facts

Because the issues in this case are legal ones, the facts can be stated briefly.

Petitioner was convicted of multiple sexual felonies against his stepdaughter. In his petition, he complains that the victim "was unable to pinpoint how old she was when any of the particular events she described allegedly occurred; she estimated the dates within two or three year periods." (Pet. Cert. 4). But that is not unusual with young victims of sexual abuse. Here, the victim was in first or second grade when some of the abuse occurred, but she was able to describe specific acts of abuse in detail and identify where in the family home they occurred. She described two acts of abuse, one involving oral sodomy, that took place in the defendant's bedroom; one that happened in her bedroom at night; one that occurred while she and petitioner were watching a movie and he touched her under a blanket; one that took place while she was taking a bath; and another that occurred in the garage. (Tr. 115-19, 120-23, 123-127, 129-34, 134-141, 142-45.) In all of those incidents, the victim was in the primary grades. (Tr. 117, 123, 134, 141, 146.) Two additional incidents occurred after the victim was older and in the seventh or eighth grade. One of those incidents formed the basis for a sodomy

charge and the other for a rape charge. (Tr. 158-60, 161-65.)

Petitioner notes that, when first contacted by the police, the victim “was a runaway.” (Pet. Cert. 3.) Apparently, petitioner means to imply that the victim had a motive to accuse him falsely. By the time she testified at trial, however, the victim—who had started using methamphetamine and had dropped out of school in the eighth grade—was 18, in school at a community college, had completed drug and alcohol treatment, had been off drugs for a year and a half, and devoted time to speaking to other teens about recovery. (Tr. 169.)

## **B. Trial court proceedings**

The state charged petitioner with five counts of first-degree sexual abuse, Or. Rev. Stat. § 163.427, two counts of first-degree sodomy, Or. Rev. Stat. § 163.405, and one count of first-degree rape, Or. Rev. Stat. § 163.375. (App. Br. 1, ER 1-2.) Petitioner requested that the jury be instructed that: “This being a criminal case, each and every juror must agree on your verdict.” (Pet. Cert., App. 6a). In requesting the instruction, petitioner relied on *Blakely v. Washington*, 542 U.S. 296, 301 (2004), and specifically on the following sentence taken from that opinion:

This rule [that, generally, any fact that increases the penalty for a crime

beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt] reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours,"  
 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) \* \* \*.

(Emphasis added.)

The trial court refused to give the requested jury instruction because it would not "comply with Oregon law[.]" (Pet. Cert., App. 6a.) The trial court also concluded that *Blakely* was inapposite: "I don't think *Blakely* actually speaks to this. \* \* \* It was addressing, of course, whether or not a jury should weigh in on factors that related to enhancements of sentencing. \* \* \* I don't read this as a decision by the United States Supreme Court that every state must have \* \* \* unanimous verdicts." (Pet. Cert., App. 6a-7a.)

The jury convicted petitioner of all the charges, but none of the verdicts was unanimous. Only ten jurors voted to convict on each charge. (Tr. 429-30.)

### C. State appellate court proceedings

Petitioner appealed, contending, among other claims, that the trial court had erred in refusing to give his requested jury instruction. (App. Br. 11.) The state Court of Appeals rejected that claim. The court cited Article I, section 11, of the Oregon Constitution, which provides in part, that:

in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]

(Pet. Cert., App. 6a).

On appeal, as at trial, petitioner relied on *Blakely* to support his claim. He relied on the same sentence from *Blakely* that is quoted above. (Pet. Cert. App. 6a, (quoting *Blakely*, 542 U.S. at 301 (in turn quoting 4 William Blackstone, *Commentaries on the laws of England* 343 (1769)))). Relying on *Apodaca*, the Court of Appeals rejected his argument.

Necessarily implicit in [petitioner's] argument is the premise that the Court's observation in *Blakely* had the effect of overruling *Apodaca v.*

*Oregon*, 406 U.S. 404 (1972). In *Apodaca*, the Court held that the permissibility of less-than-unanimous jury verdicts under Article I, section 11, did not violate the Sixth Amendment to the United States Constitution. *Apodaca*, 406 U.S. at 407-14.

(Pet. Cert., App. 7a) (footnote omitted).

The state Supreme Court denied review without opinion. (Pet. Cert., App. 8a).

### SUMMARY OF ARGUMENT

Petitioner asks this Court to revisit and overrule a decision it rendered thirty-seven years ago, even though this Court repeatedly has cited that decision and its conclusion without reservation, and Oregon has relied on that decision since 1972. Principles of *stare decisis* counsel that this Court should not reconsider *Apodaca* unless petitioner can make a persuasive showing that the Court's earlier decision is incorrect. Petitioner has not made that showing here. For that reason, this Court should do what it has done in other recent cases contending that the Sixth Amendment requires unanimous jury verdicts in state court criminal cases: deny the petition.<sup>1</sup>

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<sup>1</sup> *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523); *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449).

In arguing that *Apodaca* is wrong and that this Court should grant certiorari to overrule it, petitioner relies on this Court's recent quotations from Blackstone, who commented that the truth of every accusation against a criminal defendant should be confirmed by the unanimous suffrage of twelve of his equals and neighbors. Petitioner contends that *Apodaca* is "squarely inconsistent" with those recent decisions quoting Blackstone. But there is no inconsistency. The recent decisions dealt with other issues, and petitioner takes the quotations out of context.

History does not support overruling the interpretation of the Sixth Amendment that this Court adopted in *Apodaca*. As the Court recognized in that decision, the common law at the time of the Founding required a jury verdict to be unanimous. But it does not follow from that historical fact that a unanimous jury became a constitutional guarantee.

The Sixth Amendment does not explicitly include the right to a unanimous jury verdict, and this Court has held that other settled features of the common-law jury, including the requirement of a 12-person jury, are not included in the Sixth Amendment right to a jury trial. Indeed, the Sixth Amendment was adopted after the Congress rejected an earlier version of the amendment that specifically would have required unanimous verdicts. Although the reason for that

rejection is not clear, this Court has held that the more plausible explanation is that Congress intended that omission to have some substantive effect. Petitioner would give it none.

In addition, although the origins of the common-law rule requiring unanimous verdicts are unclear, all the possible rationales are outmoded. Adhering to them would be a matter of empty formalism. In short, history offers little support for petitioner's claim that the Sixth Amendment includes a right to unanimous jury verdicts in criminal cases in state court.

Finally, nothing in the empirical research on jury dynamics compels a conclusion that non-unanimous juries infringe on Sixth Amendment rights. Studies show little disparity in deliberation time between juries required to decide unanimously and those that do not deliberate under that requirement. To the extent there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict. At most, considered as a whole, the empirical research simply illustrates what this Court held in *Apodaca*: States may reasonably differ on the value of requiring unanimity. In sum, petitioner offers scant basis for this Court to revisit and overturn decades-old precedent. This Court should decline the invitation.

## REASONS FOR DENYING THE PETITION

The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law \*

\* \*

U.S. Const. amend. VI. In *Apodaca*, this Court specifically upheld Oregon's state constitutional practice that allows juries to decide cases by 10-2 or 11-1 votes as well as unanimously. 406 U.S. 404.

**A. *Stare decisis* requires that petitioner provide a compelling justification for overruling *Apodaca*.**

This Court often has stressed the importance of *stare decisis*, stating that "the doctrine \* \* \* is of fundamental importance to the rule of law" and that, accordingly, "any departure from the doctrine \* \* \* demands special justification." *Welch v. Dep't. of Highways & Pub. Transp.*, 483 U.S. 468, 494-95 (1987), (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). See also *Akron v. Akron Center for Reproductive Health, Inc.*, 462

U.S. 416- 419-20 (1983) (doctrine of *stare decisis* “demands respect in a society governed by the rule of law.”).

The Court has set the bar very high for overruling its prior decisions: “Adherence to precedent promotes stability, predictability, and respect for judicial authority. For all of these reasons, *we will not depart from the doctrine of stare decisis without some compelling justification.*” *Hilton v. S. C. Pub. Rys. Comm’n*, 502 U.S. 197, 202 (1991) (emphasis added; internal citations omitted).

Among the “factors in deciding whether to adhere to the principle of *stare decisis*” are “the antiquity of the precedent,” and “the reliance interests at stake[.]” *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) (No. 07-1529). As noted, *Apodaca* is thirty-seven years old, and Oregon has relied on it since 1972 to instruct jurors in felony trials that they need not return unanimous verdicts.

“Where a decision has ‘been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,’ these factors weigh in favor of reconsideration.” *Pearson v. Callahan*, 129 S. Ct. 808, 829-30 (2009) (No. 07-751), (quoting *Payne v. Tennessee*, 501 U.S. 808, 829-30 (1991)). The decision in *Apodaca* is unambiguous and easy to apply. Members

of this Court have not questioned *Apodaca* in subsequent decisions; on the contrary, this Court repeatedly has reiterated that decision's holding without expressing any reservation. *Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991) ("a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict."); *Burch v. Louisiana*, 441 U.S. 130, 136 (1979) (Court "conclude[d] in 1972 that a jury's verdict need not be unanimous to satisfy constitutional requirements"); *McKoy v. North Carolina*, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) (noting that the Court has "approved verdicts by less than a unanimous jury," (citing *Apodaca*)); *Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980) (Court has held that "the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict," citing *Apodaca*).

Because of the respect that *stare decisis* demands, because *Apodaca* has been settled law for thirty-seven years, and because this Court subsequently has not questioned that decision but instead has cited its holding without reservation, this Court should consider overruling it only if petitioner can provide a "compelling justification" for doing so. *Hilton*, 502 U.S. at 202. He has not done so, and this Court should not grant certiorari.

**B. *Apodaca* is not inconsistent with *Blakely* or *Apprendi*.**

In urging this Court to overrule *Apodaca*, petitioner relies heavily on this Court's recent decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which he claims are flatly inconsistent with *Apodaca*. Petitioner relies especially on the statement in *Blakely* that the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" (Pet. Cert. App. 6a, (quoting *Blakely*, 542 U.S. at 301 (in turn quoting Blackstone, *supra*, at 343) (emphasis added in Pet. Cert.)). Apparently, petitioner believes that, when the Court quoted Blackstone in its discussion of when the Sixth Amendment requires factual findings to be made by a jury rather than the court, this Court also intended to interpret the Sixth Amendment to require unanimous jury verdicts in state criminal cases.

But neither *Blakely* nor *Apprendi* dealt with the issue of whether the Sixth Amendment requires unanimous jury verdicts. The issue in *Blakely* and *Apprendi* was whether basing an enhanced sentence on fact-finding by the trial court violated the petitioner's Sixth Amendment right to trial by jury. 542 U.S. at 298; 530 U.S. at 468-69). Thus, when the Court in *Blakely* referred to the "long standing tenet" that the "truth of every

accusation" against a defendant should be "confirmed by the unanimous suffrage of twelve of his equals and neighbours," 542 U.S. at 301 (quoting Blackstone), it did so in a strikingly different context, involving issues quite different than the one presented here. *Apodaca* simply is not "squarely inconsistent" with *Blakely* and *Apprendi*.<sup>2</sup>

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<sup>2</sup> Petitioner also relies on other decisions from this Court that, according to him, have "held or assumed \* \* \* that the Sixth Amendment require[s] unanimity for a criminal conviction." (Pet. Cert. 9) (citations omitted). Those decisions offer little support for petitioner's cause. In *Maxwell v. Dow*, 176 U.S. 581 (1900), and *Patton v. United States*, 281 U.S. 276 (1930), the discussions of jury unanimity were *dicta*. The issue in *Maxwell* was whether an eight-person jury was constitutionally permissible in state criminal trials. 176 U.S. at 582. In *Patton*, the issue was whether the criminal defendant could agree to an 11-person jury. 281 U.S. at 286. *Thompson v. Utah*, 170 U.S. 343, 352 (1898), cited by petitioner, also involved an eight-person jury. *Andres v. United States*, 333 U.S. 740 (1948), involved a prosecution for a crime committed on federal property. In that case, the Court concluded, rather summarily, that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply," citing only *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897). *Andres*, 333 U.S. at 748 & n. 13. In *American Pub. Co.*, which dealt with the right to jury trial under the Seventh Amendment, the Court specifically noted that "the power of a state

**C. Petitioner's historical arguments provide no persuasive reason for this Court to revisit the result in *Apodaca*.**

Petitioner also relies on history, asserting that it has been “settled’ since ‘the latter half of the 14<sup>th</sup> century \* \* \* that a verdict had to be unanimous’ to convict someone of a crime and that this requirement ‘had become an accepted feature of the common-law jury by the 18<sup>th</sup> century.’” (Pet. Cert. 9, (quoting *Apodaca*, 406 U.S. at 407-08 & n. 2).) The Court accepted that reading of history in *Apodaca*. That does not, however, equate to petitioner’s suggestion that, if a feature of the common-law jury was settled at the time the Bill of Rights was adopted, it must have been incorporated in the Sixth Amendment.

This Court clearly has rejected petitioner’s approach, because it has held that not all features of the common-law jury are included in and guaranteed by the Sixth Amendment. Notably, although the 12-person jury also was an accepted feature of the common-law jury at the time of the Founding—and although Blackstone mentions that numerical common-law requirement in the

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to change the rule in respect to unanimity of juries is not before us for consideration.” 166 U.S. at 468 (citations omitted). When that issue came before the Court in *Apodaca*, the Court ruled that unanimity is not required under the Sixth Amendment.

same sentence from his Commentaries that petitioner relies on and that this Court quoted in *Blakely* and *Apprendi*—this Court has held that the Sixth Amendment does not require 12-person juries. *Williams v. Florida*, 399 U.S. 78, 86 (1970).

The Court reviewed the relevant constitutional history in detail in *Williams*, 399 U.S. at 94-99, and summarized it in *Apodaca*, 406 U.S. at 409. The history underlying the Sixth Amendment “casts considerable doubt on the easy assumption that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution” *Williams*, 399 U.S. at 92-93. Instead, although the historical record can lead to competing conclusions, the stronger inference is that one of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict.

In *Apodaca*, this Court summarized the history of the Sixth Amendment. The Court concluded that “[t]he *most salient fact* in the scanty history of the Sixth Amendment” is that, although “as it was introduced \* \* \*, the proposed Amendment provided for trial ‘by an impartial jury of the freeholders of the vicinage, *with the requisite of unanimity for conviction* \* \* \* and other accustomed requisites,’ ultimately the unanimity and “accustomed requisites” provi-

sions were not included. 406 U. S. at 409 (emphases added; citation omitted). Indeed, the conference committee “refused to accept not only the original \* \* \* language but also an alternate suggestion \* \* \* that juries be defined as possessing ‘the accustomed requisites.’” *Id.* (citation omitted).

This Court noted in *Apodaca* that, as it had “observed in *Williams*, one can draw conflicting inferences from this legislative history.” 406 U. S. at 409.

One possible inference is that Congress eliminated references to unanimity and to the other “accustomed requisites” of the jury because those requisites were thought already to be implicit in the very concept of jury. *A contrary explanation, which we found in Williams to be the more plausible, is that the deletion was intended to have some substantive effect.*

*Id.* at 409-10, (citing *Williams*, 399 U. S. at 96-97 (emphasis added)).<sup>3</sup>

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<sup>3</sup> *Amici* Charles Hamilton Institute for Race and Justice, et al., accuse the *Apodaca* plurality of having ignored and “broke[n] [with] literally centuries of well-settled common law precedent requiring unanimous criminal verdicts[.]” (CHHIRJ Br. 5). It is more

Thus, far from the history of the Sixth Amendment supporting petitioner's claim that the provision includes a right to a unanimous jury verdict in state criminal trials, this Court has concluded that the "more plausible" explanation for the fact that the Amendment does not explicitly include such a right is that the deletion "was intended to have some substantive effect." Petitioner would have the Court overlook and override that intended effect.

In *Apodaca*, this Court also reviewed the reasons why the unanimous jury verdict had become a settled feature of the common law. As this Court observed in *Williams*, 399 U.S. at 89—with regard to the requirement of a 12-person jury—the requirement of a unanimous jury verdict appears to have been a "historical accident" that had its origins in outmoded medieval concepts.

This Court has identified "[a]t least four [possible] explanations \* \* \* for the development of unanimity" at common law. *Apodaca*, 406 U. S. at 407 n. 2. All of them are either outmoded or historical accidents. The first explanation is that

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accurate to say that *Apodaca* reviewed that history, but found that it did not lead to the conclusion that any such common-law right is included in the Sixth Amendment. *Amici* and petitioner ask this Court to plow ground that the Court has already been over in detail.

“unanimity developed to compensate for the lack of other rules insuring that a defendant received a fair trial.” *Id.* (citations omitted). The “second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique \* \* \* was abandoned, the requirement that one side obtain the votes of all 12 jurors remained.” *Id.* (citations omitted). “A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case,” and that “the medieval mind assumed that there could be only one correct view of the facts[.]” Therefore, if some or all of the jurors “declared the facts erroneously, they might be punished for perjury.” *Id.* (citations omitted). “The final explanation is that jury unanimity arose out of the medieval concept of consent.” *Id.* To the medieval mind, the concept of consent “carried with it the idea of \* \* \* unanimity[.]” *Id.* (internal quotation marks and citation omitted). Even in 18<sup>th</sup> century America, there was “a similar concern that decisions binding on the community be taken unanimously.” *Id.* (citation omitted).

Those historical reasons for the common-law requirement of a unanimous jury verdict have little, if any, force now. Instead, “[m]any of the possible reasons for the unanimity requirement are ones that are substantially less persuasive now—and the Court itself has recognized this.” Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 *Hastings Const. L. Q.* 141, 143 (2006). “If unanimity developed at common law ‘to compensate for the lack of other rules insuring that a defendant received a fair trial, American criminal procedure now has many more substantial protections for defendants.” Leib, *supra*, at 143 (quoting *Apodaca*, 406 U. S. at 407 n. 2). If unanimity “arose out of the practice in the ancient mode of trial by compurgation”—a mode of trial where certain kinds of witnesses essentially became jurors—that practice “has very little relevance to contemporary trials, where we’d never allow a witness on the jury[.]” Leib, *supra*, at 143. “[W]e should have no allegiance to a decision rule that arose out of a jury practice that has so little to do with our own.” *Id.* “If the unanimity requirement arose out of the medieval idea that reasonable people cannot disagree and that minority jurors must be lying, we must certainly abandon it in our pluralistic society.” *Id.* (citations omitted throughout). Given the outdated rationales for the common-law requirement of unanimity, reading it into the Sixth Amendment

would be to “ascribe a blind formalism to the Framers[.]” *Williams*, 399 U.S. at 103.

Thus, neither the history of the Sixth Amendment nor the reasons for the common-law requirement of jury unanimity provide any “compelling justification,” *Hilton*, 502 U.S. at 202, to disregard principles of *stare decisis* and overrule *Apodaca*. Instead, as this Court has recognized, *Apodaca*’s treatment of history parallels the Court’s treatment of history in *Williams*. *Burch*, 441 U.S. at 136 (noting that “[a] similar analysis” to that in *Williams* led the Court in *Apodaca* to conclude “that a jury’s verdict need not be unanimous to satisfy constitutional requirements, even though unanimity had been the rule at common law”); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976) (a “[s]imilar analysis [to that in *Williams*] led to the holding in *Apodaca* that the jury’s verdict need not be unanimous”).

**D. Recent empirical research is not relevant to whether this Court should revisit *Apodaca* and, in all events, provides no persuasive support for petitioner’s claim.**

Turning from history, petitioner contends (Pet. 22) that recent empirical research comparing the experiences of unanimous and non-unanimous juries “confirms the wisdom of the historical unanimity requirement” and demonstrates that this Court’s decision in *Apodaca*

cannot stand. Yet, as discussed above, before this Court revisits *Apodaca*, petitioner must offer more than a suggestion that jury unanimity may be “wiser” than non-unanimous juries. As this Court has recognized, “no judicial system could do society’s work if it eyed each issue afresh in every case that raised it.” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), (citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921)). Instead, when this Court re-examines a prior holding, “its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law[.]” *Id.* at 854-55.

Recent empirical research demonstrating that a state’s decision to permit non-unanimous juries may affect the dynamics of jury deliberations provides no basis to revisit long-standing precedent. The question here—as it was in *Apodaca*—is whether the Sixth Amendment prohibits non-unanimous juries; nothing about that constitutional question has changed in the 37 years since this Court decided *Apodaca*. That petitioner can point to some studies suggesting that states *should not* permit non-unanimous juries reasons says nothing about whether the states *cannot* permit non-unanimous juries. States remain free to make policy choices so long as those choices do

not infringe upon constitutional protections and liberties. *Casey*, 505 U.S. at 849. In all events, nothing since *Apodaca*—empirically or experientially—has demonstrated that this Court’s decision in *Apodaca* is unworkable or unsound, or suggests that *Apodaca* was based on a fundamentally mistaken, or subsequently discredited, view of jury dynamics.

Petitioner relies (Pet. 23) on conclusions from various studies that jurors who are not required to achieve unanimity evaluate the evidence less thoroughly, spend less time deliberating, and take fewer ballots. In petitioner’s view, that evidence undermines this Court’s conclusion in *Apodaca* that a unanimity requirement “does not materially contribute to the exercise” of a jury’s “commonsense judgment.” 406 U.S. at 410. But studies show that little disparity actually exists in the duration of deliberations and—even more critically—that to the extent that there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict.

The “most comprehensive jury study” conducted in the past thirty years has shown a “minimal disparity” between the amount of time that juries spend deliberating when unanimity is required and the amount of time they spend when unanimity is not required. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 488 (1966);

Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St U. L. Rev. 659, 672 (1997). That same study also demonstrates that in nine out of ten cases, the result of the first ballot is the same as the verdict. *Id.*; see also Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 690 (2001). Thus, to the extent that there is any disparity in the length of deliberation, that time is often spent trying to convince one or two holdouts. And in jurisdictions that require jury unanimity, those holdout jurors often simply succumb to the "pressure for unanimous agreement[.]" Leib, *supra*, at 144-45. Thus, contrary to petitioner's assumptions, a jury unanimity requirement does not necessarily guarantee or promote "open-minded debate" in an ideally deliberative environment; rather, the time spent attempting to achieve unanimity is often spent pressuring and cajoling the few holdouts into acquiescence.

Of greater significance, however, is that the degree and nature of the deliberations is not directly proportional to the accuracy of any verdict. Most experts agree that the accuracy of the ultimate verdict is not contingent upon the whether jury unanimity is required. See Leib, *supra*, at 144 ("most agree that the outcomes of verdicts do not significantly vary" depending upon whether

there exists a unanimity rule or not). Permitting juries to reach non-unanimous verdicts, therefore, does not undermine the ultimate purposes of the jury: to safeguard a defendant against the corrupt or overzealous prosecutor and the biased judge, and to assure a fair and equitable resolution of factual issues. *Apodaca*, 406 U.S. at 410; *Gasoline Products Co. v. Champlin Co.*, 283 U.S. 494, 498 (1931).

Petitioner further contends (Pet. 25) that allowing non-unanimous jury verdicts marginalizes jurors who are members of minority groups. Petitioner again relies on empirical research that, in his view, demonstrates that the non-unanimous jury scheme in effect silences dissenting and minority voices. But unanimity cannot guarantee mutual tolerance. Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. Davis L. Rev. 1169 (1995). That is, unanimity simply does not guarantee that juries will tolerate opposing or minority views or listen to reason and consider the evidence. In reality, whether the minority is likely to speak up or not depends more upon the different personalities of the jurors. Glasser, *supra*, at 674. In fact, it is at least equally likely that the non-unanimous jury system actually encourages the minority to speak up, because they need to convince fewer other jurors to come to their side. *Id.*

In sum, to support overruling a constitutional decision that Oregon has been relying upon for 37 years, petitioner must provide something more compelling than some recent analyses of jury behavior. That is particularly true when the evidence petitioner relies upon presents an incomplete picture of how the non-unanimity requirement affects jury deliberations. Wiser or not, unanimous juries are not a Sixth Amendment mandate. This Court thus need not reconsider the system that Oregon's Constitution requires it to follow and that this Court has already upheld.

### CONCLUSION

Petitioner asserts that "[t]wo states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so." (Pet. Cert. 30.) That accusation is unfounded. It is more accurate to say that those states have relied on this Court's decades-old case law in permitting juries in most felony cases to return less-than-unanimous verdicts. Petitioner asks this Court to grant his petition and reconsider *Apo-daca* based on quotations from *Blakely* and *Apprendi* that are taken out of context, history that this Court has already does not support petitioner's argument, and empirical research that does not yield any clear conclusion that unanimous jury verdicts are necessarily preferable, let alone constitutionally required. As it did twice in

2008, note 1, *supra*, this Court should decline the invitation and deny the petition.

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IN THE  
Supreme Court of the United States

SCOTT DAVID BOWEN,  
*Petitioner,*

v.

STATE OF OREGON,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
Oregon Court of Appeals

REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

The State does not deny the extraordinary importance of the question presented. Nor can the State seriously dispute that this case perfectly showcases the uncertainties of non-unanimous verdicts. The overarching issue at trial was credibility. Indeed, the State's whole closing argument was designed to build credibility for an accuser whom the prosecutor himself described as a "runaway" methamphetamine user, with a history that demonstrated a "lack of trustworthiness." Tr. 370, 372. Faced with the kind of accusations capable of "overwhelm[ing] a decent person's judgment," *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2661 (2008), ten jurors sided with the State and two with petitioner. In forty-eight states, the jurors would have been required to continue deliberating toward consensus (and, as elaborated below, would eventually have declined to convict over one-third of the time). But because this case arose in Oregon, petitioner stands convicted.

Nor does the State dispute that this Court's recent Sixth and Fourteenth Amendment jurisprudence is largely inconsistent – and in some ways flatly incompatible – with the reasons the five-Justice majority in *Apodaca v. Oregon*, 406 U.S. 404 (1972), offered for allowing states to secure criminal convictions by non-unanimous jury verdicts. Instead, the State offers a partial defense of *Apodaca* and urges this Court to adhere to the outcome of that case on *stare decisis* grounds. But these arguments only serve to highlight the need for this Court to grant review in this case.

## I. THE STATE FAILS TO OFFER ANY COGENT DEFENSE OF *APODACA*.

The five-Justice holding in *Apodaca* depends on two distinct legal propositions: (A) Justice Powell's conclusion that although "the Sixth Amendment requires a unanimous jury verdict," the Fourteenth Amendment does not incorporate that aspect of the Sixth Amendment against the states, *Johnson v. Louisiana*, 406 U.S. 356, 369-80 (1972) (Powell, J., concurring in the judgment); and (B) the plurality's conclusion that the Sixth Amendment itself does not require a unanimous verdict to convict someone of a crime. The State does not defend the former conclusion and only partly defends the latter.

A. It is striking, though perhaps not surprising, that the State does not defend Justice Powell's nonincorporation reasoning. This Court's modern incorporation (and more general due process) jurisprudence has shut the door to the notion that a constitutional right can be only partially incorporated against the states. *See* Pet. for Cert. 16-19. The State's refusal to defend the linchpin of *Apodaca's* holding is reason alone to grant certiorari.<sup>1</sup>

B. The plurality in *Apodaca* asserted that the Sixth Amendment does not require unanimity for

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<sup>1</sup> This is not the only case currently on this Court's docket that raises an incorporation issue. Three petitions for certiorari raising the question whether the Second Amendment's individual right to bear arms should be incorporated against the states are pending in this Court. *See National Rifle Ass'n v. City of Chicago*, No. 08-1497; *McDonald v. City of Chicago*, 08-1521; *Maloney v. Rice*, 08-1592.

two reasons: (1) “the Sixth Amendment does not require proof beyond a reasonable doubt”; and (2) the Sixth Amendment does not require any particular voting tally to render a guilty verdict. 406 U.S. at 410-12.

1. The State does not defend the plurality’s conclusion that the Sixth Amendment does not require juries to find proof beyond a reasonable doubt. Nor could it, in light of this Court’s unanimous holding after *Apodaca* that “the jury verdict required by the Sixth Amendment is a jury verdict of guilt beyond a reasonable doubt.” *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *see also Cunningham v. California*, 127 S. Ct. 856, 863-64 (2007) (“the Sixth Amendment” requires jury verdicts “beyond a reasonable doubt, not merely by a preponderance of the evidence.”). Thus, once again, granting certiorari is necessary to resolve a manifest inconsistency in this Court’s cases that the State declines even to address.

2. The State rests its defense of the merits of *Apodaca* on a single proposition: that the Sixth Amendment does not require any particular voting tally to render a verdict of guilty beyond a reasonable doubt. The centuries-old unanimity rule, the State argues, is a “historical accident” that is purely “formalis[tic]” in nature – and thus is not properly regarded as constitutional. BIO 7, 16. This argument, however, fails on several levels.

First, the State’s conception of the Sixth Amendment contravenes this Court’s own precedent. In *Andres v. United States*, 333 U.S. 740 (1948), this Court held – consistent with several prior pronounce-

ments – that “[u]nanimity is required in jury verdicts where the Sixth and Seventh Amendments apply.” *Id.* at 748; *see also American Pub. Co. v. Fisher*, 166 U.S. 464, 467-68 (1897) (Seventh Amendment requires unanimity in civil cases); Pet. for Cert. 9 (citing other cases expressing this understanding of Sixth Amendment). While the State says that *Andres* reached this decision “rather summarily,” BIO 12 n.2, it nonetheless reached it.

Nothing in *Apodaca* undercut this precedent. To the contrary, five Justices in *Apodaca* reaffirmed that when the Sixth Amendment applies, it requires a unanimous verdict. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment); *id.* at 395 (Brennan, J., dissenting). Every federal court of appeals to have considered the issue since thus has concluded that *Andres* remains good law.<sup>2</sup>

The State, like the (outvoted) *Apodaca* plurality, protests that the “legislative history” of the Sixth Amendment calls into question whether the Framers truly intended to preserve the common law’s unanimity requirement. BIO 15 (quoting *Apodaca*, 406 U.S. at 409). But as this Court has noted, “[i]t is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing

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<sup>2</sup> *See, e.g., United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998); *HSincox v. United States*, 571 F.2d 876, 878-79H (5th Cir. 1978); *United States v. Smedes*, 760 F.2d 109, 111-12 (6th Cir. 1985); *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987); *United States v. Savage*, 7 F.3d 1435, 1439 (9th Cir. 1995); *United States v. Hernandez-Garcia*, 901 F.2d 875, 877 (10th Cir. 1990); *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006).

right, rather than to fashion a new one.” *District of Colombia v. Heller*, 128 S. Ct. 2783, 2804 (2008). And modern academic research concerning the jury at common law and at the time of ratification has confirmed that one cannot draw any conclusions from the removal, or absence, of specific references to the “accustomed requisites” of rights codified in the Sixth Amendment. See, e.g., *Barbara Shapiro, Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence* 9-38 (1991). The best evidence of the Sixth Amendment’s meaning thus remains the understanding of the right to jury trial when the Amendment was adopted, which even the *Apodaca* plurality acknowledged included a unanimity requirement. 406 U.S. at 408-09.

Second, this Court’s post-*Apodaca* jurisprudence makes clear that details of the Sixth Amendment are binding even when those details are supposedly “formalistic.” The Sixth Amendment codifies “specific” rights “that were the trial rights of Englishmen.” *Giles v. California*, 128 S. Ct. 2678, 2692 (2008); see also Pet. for Cert. 12-15. A unanimity requirement was one of those rights. See 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769).

Third, even if “formalistic” elements of the right to jury trial were constitutionally nonbinding, there is nothing formalistic about the Sixth Amendment’s unanimity requirement. It bears repeating Justice (then Judge) Kennedy’s explanation why this is so:

The dynamics of the jury process are such that often only one or two members express

doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

*United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). The Sixth Amendment's unanimity requirement, in fact, plays such an indispensable role in criminal trials that a defendant cannot even waive it. *Id.*; accord *United States v. Pachay*, 711 F.2d 488, 491 (2d Cir. 1983) (agreeing with several other circuits to this effect).

The State contends that "[r]ecent empirical research" shows unanimity is not so important after all. BIO 20. But if there is any message resoundingly delivered by the cascade of *amicus* briefs in this case – from sources as varied as the American Bar Association, experts in academia, and criminal justice organizations – it is that recent empirical research confirms just the opposite: a unanimity requirement is a vital component of our system of trial-by-jury. What is more, the most recent work on this score indicates that almost two-thirds of felony convictions in Oregon involve non-unanimous votes on at least one count. *See Jury Experts' Amicus Br. 7*; *OCDLA Amicus Br. 4*. So the practical problems

raised by Oregon's and Louisiana's non-unanimity schemes infect jury deliberations on a daily basis in those states.

None of literature the State cites gives any reason for doubting these expert analyses. Citing one academic article and one student comment defending non-unanimity, the State suggests that the goal of its system is to accept the results of lopsided, yet divided, "first ballot[s]," while avoiding "time [that] is often spent trying to convince one or two holdouts." BIO 22. But the compilation of empirical studies that the State cites confirms that such first ballots regularly fail to produce guilty verdicts in states that require unanimity: Initial 10-2 ballots (the determinative tally in this case) result in guilty verdicts in unanimity regimes only 64.7% of the time. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 692 (2001) (Table 6), *cited in* BIO 22. Even when such initial ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of bench trials and nearly 20% of jury trials. National Center for State Courts, *Are Hung Juries a Problem?*, 26-27 (2002). The idea, therefore, that non-unanimity schemes do not affect deliberations and ultimate verdicts is refuted by the State's own authority.

Lest there be any doubt, the State's own law gives away its true view toward its non-unanimity scheme. Oregon, like Louisiana, exempts first-

degree murder from its non-unanimous jury system. Or. Const. art. I, § 11; *see also* La. C. Cr. P. Art. 782(A). The only conceivable reason for doing so is to require more careful deliberations and greater certainty before punishing someone for that grave offense. For all other crimes, these two states have decided – as the Oregon Supreme Court forthrightly has put it – “to make it easier to obtain convictions.” *State ex rel. Smith v. Sawyer*, 501 P.2d 792, 793 (Or. 1972). This Court should make it clear that the Constitution prohibits such action.

## II. THE STATE’S *STARE DECISIS* ARGUMENT IS UNPERSUASIVE.

The State’s *stare decisis* argument fares no better than its defense of *Apodaca* itself. Just last Term, this Court explained that considerations in favor of *stare decisis* are at their nadir “in cases . . . involving procedural and evidentiary rules” because such rules do not produce “reliance” like substantive rules do. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (quotation marks and citation omitted). This is all the more so when, as here, the procedural holding at issue is constitutional in nature, and when the holding is an aberration among an otherwise harmonic body of jurisprudence. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2734 (2007) (Breyer, J., dissenting).

The State nonetheless insists that it has relied on *Apodaca*. BIO 9. But neither Oregon nor Louisiana has reconfigured its criminal justice system in response to *Apodaca*. Indeed, the State cannot point to a single state policy (other than the non-unanimity policy at issue here) or legal doctrine

that depends upon *Apodaca*. Nor could the State plausibly assert that it would be difficult to switch to a unanimity system on a prospective basis. In short, the States of Oregon and Louisiana stand in exactly the same position as they did in 1972.

The State also cites a handful of decisions from this Court that have mentioned *Apodaca* and recited its holding. BIO 9-10. But it does not cite a single decision or legal doctrine that depends on the continued constitutionality of states' allowing non-unanimous verdicts. Nor has the federal government or any other state acted in reliance on *Apodaca*.

Oregon and Louisiana, therefore, remain the sole national outliers, engaging in a practice that flouts several hundred years of Anglo-American legal heritage and the continuing public perception of the fair administration of justice. It is hard to imagine a less compelling case for *stare decisis*.

In any event, even if the State could point to any legitimate *stare decisis* concerns here, those concerns would be at most grist for debate at the merits stage. They would not dispel the need to grant certiorari. Given how this Court's jurisprudence has severely undercut *Apodaca's* logic in recent years, it behooves this Court to address *Apodaca* head-on and to lay to rest once and for all whether *Apodaca* should remain good law.<sup>3</sup>

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<sup>3</sup> That the courts in Oregon and Louisiana are unable to put this issue to rest (*see* Pet. for Cert. 29-30) was recently confirmed by the Louisiana Supreme Court, which rejected a constitutional challenge to that state's non-unanimity rule on the ground that only this Court may announce *Apodaca's* demise. *State v. Bertrand*, 6 So.3d 738, 743 (La. 2009).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

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SCOTT DAVID BOWEN,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The Oregon Court Of Appeals**

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**BRIEF OF JEFFREY ABRAMSON, CAROLINE L.  
DAVIDSON, SHARI S. DIAMOND, THEODORE  
EISENBERG, PHOEBE C. ELLSWORTH, SAMUEL  
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MARY R. ROSE, MICHAEL J. SAKS AND  
NEIL VIDMAR AS AMICI CURIAE  
IN SUPPORT OF PETITIONER**

---

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## QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

Amici are university professors whose teaching and scholarship have addressed historical, behavioral, and constitutional questions about jury unanimity. Amici are identified in the Appendix.

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## SUMMARY OF ARGUMENT

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), a fractured Court concluded that the Sixth and Fourteenth Amendments did not mandate the traditional requirement of unanimity for criminal jury trials in state courts. The Court recognized that unanimity had been a requirement of common-law juries for hundreds of years, but a plurality considered that historical background unimportant. Instead, the plurality relied on a functional test for jury procedures, and concluded that non-unanimous decision making was consistent with the essential functions of the jury, as the plurality saw them. In the process, the plurality assumed that non-unanimous jury deliberations would be as robust, and that minority viewpoints would be as thoroughly

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<sup>1</sup> This brief was drafted exclusively by the named amici. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file; they have consented to the filing of this brief.

represented, as in deliberations by traditional juries. These factual assumptions were questionable in 1972, but there was little systematic evidence one way or the other. We have since learned that they are wrong. Empirical studies conducted since 1972 show that jury deliberations are in fact less vigorous when unanimity is not required, and that the unanimity requirement is necessary to ensure that minority voices receive full hearing. Accordingly, we urge the Court to grant certiorari in *Bowen v. Oregon*, No. 08-1117, to reconsider *Apodaca* and *Johnson*.



## ARGUMENT

### 1. Introduction

*Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), produced a fractured set of opinions with an array of interpretations of history, precedent, and the text of the Constitution. We write to address one of the bases for the plurality opinions in *Apodaca* and *Johnson*: the effect of the unanimity requirement on jury functioning. The unanimity requirement's impact on jury deliberations, and its effect on community support for jury verdicts, were the subjects of a heated debate between the plurality and the dissent. The plurality concluded that removal of the unanimity requirement would not undercut features of jury decision making that it considered essential. We express no general view on the

appropriateness of this functional test for the constitutionality of modifications of traditional jury procedures, which was first announced by the Court in *Williams v. Florida*, 399 U.S. 78 (1970), but if it is employed its factual premises ought to be correct. In this case they are not.

When the Court decided *Apodaca* and *Johnson* 37 years ago, no empirical studies had directly compared jury functioning under unanimous and non-unanimous verdict rules. A single study in *The American Jury* by Harry Kalven, Jr., and Hans Zeisel provided some indirect empirical evidence on the frequency of hung juries, and on the likelihood that jurors holding a minority position on the first ballot would persuade the majority. HARRY KALVEN, JR., AND HANS ZEISEL, *THE AMERICAN JURY* (1966). Both the plurality and the dissent in *Apodaca* and *Johnson* cited that work, drawing different conclusions from the study. The study itself provided no evidence on the robustness of deliberations or the treatment of minority views on the jury. All members of the Court recognized that full and open debate was a crucial feature of jury deliberations, but they were forced to rely on their own intuitions about jury behavior. Specifically, the plurality concluded that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Apodaca*, 406 U.S. at 411.

Since 1972 substantial empirical evidence has accumulated that sharply contradicts the assumptions

about jury functioning in the plurality opinions, and supports those made by the dissenting opinions. This new evidence includes: a study of felony jury trials in multiple jurisdictions, Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem?* (2002), available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf); a study of actual civil jury deliberations, Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-unanimous Jury*, 100 N.W. U. L. REV. 201 (2006); a study of non-unanimous criminal trial verdicts in Oregon, Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* (May 21, 2009), available at <http://www.ojd.state.or.us/osca/opds/Reports/index.html>; and several jury simulation studies, summarized in Dennis L. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001); REID HASTIE, STEVEN D. PENROD, AND NANCY PENNINGTON, *INSIDE THE JURY* (1983); MICHAEL J. SAKS, *JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE* (1977). It is now clear that jury functioning is significantly compromised when the traditional requirement of jury unanimity is removed.

Our conclusions are informed by findings from different types of jury research, each with its own

strengths. Comparing jury outcomes across jurisdictions with unanimous and non-unanimous decision rules provides information about what occurs in practice in jury systems that operate under these different decision rules. Jury questionnaires offer a juror's-eye view of the experience of deliberating under a particular decision rule. Jury simulation experiments that randomly assign groups to deliberate under either a unanimous or a majority decision rule allow researchers to make clear causal assessments concerning the impact of a decision rule on group and individual behavior. Observations of actual juries provide direct information on jury deliberations. Some of the limitations of these diverse research approaches – memory problems in juror self-reports, for example, or difficulties in drawing inferences about jury behavior from data on the outcomes of actual cases – are offset by the special strengths of the other methodologies – e.g., the behavior observed in actual deliberating juries. Social scientists generally agree that the optimal way to examine social phenomena is with multiple methodologies, and that the strongest conclusions are those that are supported by consistent findings based on different methods. That is what we see here.

## **2. Unanimity promotes robust jury deliberations**

To achieve a robust deliberation, a jury must engage in a thoughtful and thorough evaluation of the evidence rather than simply taking a swift vote

or conducting a perfunctory discussion to resolve differences. Justice White, writing for the plurality in *Johnson*, claimed that a "majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose . . ." *Johnson*, 406 U.S. 361. The dissenting Justices were unconvinced. Justice Douglas wrote of the danger of non-unanimous verdicts: "The Court now extracts from the jury room this automatic check against hasty factfinding by relieving jurors of the duty to hear out fully the dissenters." *Johnson*, 406 U.S. 389. Empirical evidence from jury studies conducted in the years since *Apodaca* and *Johnson* confirms Justice Douglas's intuition that robust deliberations are promoted by requiring unanimity, whether measured by intensity of effort to reach agreement, the length of deliberations, or the breadth of topics considered.

Diamond et al. (2006) examined the deliberations of actual Arizona civil juries in which only six of eight jurors had to agree to the verdict. They found that jurors were quite conscious that they needed only a six-to-two majority in order to return a verdict. On some juries the majority attempted to persuade those in the minority even when their votes were not required; on other juries, the majority relied on the fact that they were permitted to deliver a majority verdict, terminated any attempt to resolve differences, and ended the debate when the required minimum vote was reached. On those juries, once the

requisite majority was achieved, dissenting views were dismissed.

The Appellate Division of the Oregon Office of Public Defense Services recently analyzed felony jury trial records from 662 indigent appeal requests handled by that division in 2007 and 2008, or 46.5% of *all* felony jury trials in Oregon in that two-year period. Oregon Office of Public Defense Services Appellate Division (2009). The juries were polled in 63% of this sample of trials. In 65.5% of the trials in which we know the final vote – nearly two thirds of the cases in the sample – the jury reached a non-unanimous verdict on at least one of the counts (*id.*). Even making allowance for the possibility that cases handled on appeal by the Office of Public Defense may not be fully representative of all felony trials in Oregon, these findings indicate that non-unanimous felony verdicts are common in Oregon, perhaps occurring in a majority of all felony trials. By contrast, hung juries occur in only a few percent of trials in jurisdictions that require unanimous verdicts. See *infra*, section (6). These results imply that when unanimity is required, juries spend more time and care before reaching unanimous verdicts for one side or the other.

Laboratory studies conducted since *Apodaca* and *Johnson* have also found that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach non-unanimous verdicts. See James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt, and

David Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975); Devine et al. (2001); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305 (1976); HASTIE ET AL. (1983); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCH. 38 (1977); and SAKS (1977). When unanimity was not required, jurors tended to end their deliberations soon after the required quorum was reached.

Evidence that juries take longer to reach a verdict when they are required to be unanimous is a strong sign that the unanimity rule promotes robust deliberation. Another measure of the robustness is the extent to which the jury thoroughly covers key factual material during its deliberations. One controlled jury experiment found that juries assigned to a rule requiring unanimity not only spent more time discussing the evidence – consistent with their longer deliberations – but also rated those deliberations as more thorough than juries assigned to a non-unanimous decision rule. HASTIE ET AL. (1983). Similarly, post-trial evaluations by real jurors deliberating under a non-unanimous decision rule revealed that jurors who reached unanimous verdicts rated their deliberations as more thorough than both majority and holdout jurors who served on juries that ended with non-unanimous verdicts. Diamond et al. (2006).

**3. Unanimity ensures that jurors with minority views participate fully and that their positions receive attention from those in the majority**

Although jurors typically treat one another with respect, they are also practical. When unanimity is not required, jurors may give short shrift to those in the minority, whose votes the decision rule has made superfluous. In *Johnson*, Justice Brennan argued in dissent that "[w]hen verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace." *Johnson*, 406 U.S. 306. Recent empirical evidence supports Justice Brennan's reasoning.

Several experimental jury simulation studies have found that jurors holding minority views participate less and are seen as less influential when unanimity is not required. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1 (2001); VALERIE P. HANS AND NEIL VIDMAR, JUDGING THE JURY, 174-75 (1986); HASTIE ET AL. (1983). Minority jurors operating under a majority decision rule are less likely to report that they made the arguments that they wanted to make, compared to minority jurors deliberating under a unanimity rule. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition*

and *Assigned Rule on the Judgment of Mock Juries*, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976). As a juror in a six-to-two majority told a fellow juror in the minority during deliberations in an Arizona civil trial, “no offense, but we are going to ignore you.” Diamond et al. (2006), at 216.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court held that the Sixth Amendment requires that a criminal trial jury be drawn from a representative cross-section of the community in which the trial occurs. The unanimity requirement is a key element in promoting meaningful jury participation by all segments of the community, consistent with *Taylor* and many other Supreme Court decisions. See JEFFREY ABRAMSON, *WE, THE JURY* (1994); NANCY S. MARDER, *THE JURY PROCESS* (2004); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000). In particular, to the extent that those holding minority views are members of racial or ethnic minorities, a non-unanimous decision rule undermines their ability to influence outcomes and threatens the legitimacy of the system whenever juror opinions split along racial or ethnic lines, as they sometimes do. Taylor-Thompson (2000). As Justice Stewart said in his *Johnson* dissent, “[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of unanimity and impartial selection thus complement each other in ensuring the

fair performance of the vital functions of a criminal court Jury." *Johnson*, 406 U.S. 398.

**4. Unanimity provides the opportunity for jurors with minority views to persuade the majority**

Most jury verdicts generally are consistent with the position of the majority on the first ballot. Nonetheless robust deliberations provide an opportunity for those in the minority to persuade their fellow jurors to change course. This need not be as dramatic as the complete turn-around depicted in the classic film *Twelve Angry Men*. TWELVE ANGRY MEN (VA/Onion-Nova Productions 1957). Nonetheless, it allows dissenters to point out nuances that might lead to a consensus that not all charges have been proved, or that a lesser included charge is more appropriate, after a more thoughtful and thorough consideration of the evidence. By contrast, a non-unanimous decision rule undermines the minority from the start.

Recently, the National Center for State Courts conducted a study of the causes of hung juries in felony trials in four jurisdictions, all of which require jury unanimity. Hannaford-Agor et al. (2002); Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, and G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003). Questionnaires from approximately 3500 jurors provided information on the jury's first ballots and final verdicts. In most

cases, a verdict was reached and the verdict favored by a majority on the first ballot prevailed. Notably, however, in over ten percent of the cases, jurors who favored a minority position at the time of the first ballot were able to convince the majority jurors to adopt the minority's favored verdict. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI-KENT L. REV. 579, 583, Figure 1 (2007). This finding probably understates minority influence under a unanimity decision rule, since often there is considerable discussion before a first ballot is taken.

##### **5. Unanimity promotes confidence in the accuracy and fairness of the jury's verdict**

In *Johnson*, Justice Powell, concurring in the judgment permitting non-unanimous verdicts in criminal trials in state courts, assumed that community confidence in and respect for jury verdicts would not be undermined by a rule permitting non-unanimous verdicts. *Johnson*, 406 U.S. 374. Two types of empirical studies call this assumption into question. First, jurors themselves are less confident in the accuracy of their own verdicts when they are not required to agree unanimously. HASTIE ET AL. (1983); SAKS (1977); Nemeth (1977). Second, community residents who rated the procedures used in jury trials viewed unanimous procedures as fairer and more accurate than non-unanimous procedures. Robert J. MacCoun and Tom Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural*

*Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333 (1988).

## **6. The unanimity requirement has only a modest impact on the frequency of hung juries**

Juries required to reach unanimity are more likely to hang than juries permitted to arrive at a verdict without obtaining consensus, but the available data suggest that the difference is modest, approximately 5.6% versus 3.1%. KALVEN & ZEISEL (1966), at 461. The reason for this modest difference is that hung juries are rarely caused by one or two jurors who are consistently at odds with the rest of the jury. Rather, hung juries are most likely when the jury is initially more evenly divided. For example, in the National Center for State Courts study of felony juries, in those cases in which only one or two jurors were in the minority on the first ballot, only 2.9% ended with a hung jury. Hannaford-Agor et al. (2002), at 66, Table 5.2. In the 83 percent of the cases in which hung juries did occur, the minority position was initially supported by at least three jurors (*id.*). This result replicates a tentative finding reported by Kalven and Zeisel, showing that hung juries tend to occur only when a substantial minority exists, rather than when a single eccentric juror or even two jurors refuse to see reason. KALVEN AND ZEISEL (1966). Jury deadlocks predominantly reflect genuine disagreement over the weight of the evidence, rather than the irrationality or stubbornness of one or two unreasonable jurors. When deliberations begin with an

overwhelming majority favoring one verdict or the other, they are highly unlikely to end in a hung jury.

Hung juries, of course, impose costs – primarily the cost of repeating trials – but these costs are limited. Not only are hung juries rare, but the evidence indicates that only about a third of cases that produce hung juries are retried. Over half are disposed of by plea agreements, dismissals, or other dispositions. Hannaford-Agor et al. (2002), at 26-27.

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## CONCLUSION

For the reasons stated, amici respectfully urge the Court to grant certiorari in order to reconsider the holdings and the reasoning of *Apodaca v. Oregon* and *Johnson v. Louisiana*.

Respectfully submitted,

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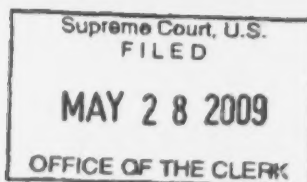
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No. 08-1117

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IN THE  
**Supreme Court of the United States**

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SCOTT DAVID BOWEN,

*Petitioner,*

v.

OREGON,

*Respondent.*

---

On Petition for a Writ of Certiorari to the  
Court of Appeals of Oregon

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**BRIEF OF AMICUS CURIAE  
AMERICAN BAR ASSOCIATION  
IN SUPPORT OF PETITIONER**

---

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## QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States by the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

Pursuant to Supreme Court Rule 37.2, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief in support of petitioner's request that this Court grant certiorari. Specifically, the ABA requests that this Court reconsider its conclusion in the principal precedent at issue in this case – *Apodaca v. Oregon*, 406 U.S. 404 (1972) – that the Constitution does not require jury unanimity for state criminal convictions. While Justice Powell, in his concurrence, cited 1968 ABA Standards as supporting this conclusion, those ABA Standards had been changed by 1976, based on overwhelming empirical data; over the succeeding thirty-plus years, they have consistently stated that unanimity should be required in all criminal jury trials.

The ABA is the largest professional membership organization and the leading organization of legal professionals. It has over 413,000 members spanning all fifty states and other jurisdictions, and its members include prosecutors, public defenders,

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<sup>1</sup> Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief.

members of the federal and state judiciaries, private attorneys, legislators, academics, and students.<sup>2</sup>

The ABA's mission is to be "the national representative of the legal profession," "serv[ing] equally our members, the profession, and the public by defending liberty and delivering justice." Among its goals are "[t]o work for . . . a fair legal process."<sup>3</sup>

In pursuing its mission and goals, the ABA has maintained a long-standing commitment to improvements to the American criminal and civil jury trial systems. This commitment has resulted in standards for criminal jury trials that have influenced policymaking and have frequently been adopted and relied on by courts. In fact, Justice Powell's opinion in *Johnson v. Louisiana*, 406 U.S. 366 (1972), which controlled the outcome in *Apodaca*, cited the ABA's Project on Standards for Criminal Justice, Trial by Jury § 1.1 (Approved Draft 1968), in reaching his conclusion that he saw no constitutional infirmity in the Oregon provision permitting less-than-unanimous verdicts. *Johnson*, 406 U.S. at 376 (Powell, J., concurring in *Johnson* and concurring in the judgment in *Apodaca*).

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<sup>2</sup> Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the ABA. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

<sup>3</sup> ABA Mission and Association Goals, *available at* <http://www.abanet.org/about/goals.html> (last visited May 6, 2009).

Based on the ABA's continuing research of jury trials, however, in 1976 the ABA's Commission on Standards of Judicial Administration published its Standards Relating to Trial Courts, in which Standard 2.10 indicated that "[t]he verdict of the jury [in criminal cases] should be unanimous." In the succeeding thirty years, the ABA has not wavered from this standard.

As this Court noted in 2005, it "long ha[s] referred to the[] ABA Standards as guides to determining what is reasonable." *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (quoting *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (internal punctuation and quotation marks omitted). With its deep and long-standing commitment to examining whether criminal jury verdicts should be unanimous, the ABA believes its unique and informed perspective may be of assistance to the Court in this matter.

### SUMMARY OF ARGUMENT

Justice Powell, in his concurrence in *Apodaca v. Oregon*, 406 U.S. 404 (1972), determined that the Constitution does not require unanimous jury verdicts in state criminal trials. While this determination was based in part on a 1968 ABA standard that permitted less-than-unanimous verdicts, the ABA changed its standard in 1976 to affirm that a jury verdict in criminal trials should be unanimous.

Throughout the thirty-plus years since *Apodaca* was decided, the ABA has continued to affirm that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial. Most recently, in 2005, as the result of its American Jury

Project, the ABA adopted nineteen core jury trial principles, one of which provides that a unanimous decision should be required in all criminal cases heard by a jury.

The ABA's standards have always been based on comprehensive review of research and empirical data on the jury's role in the criminal justice system. This work, some of which is discussed below, has led the ABA to conclude that the non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, erodes confidence in the criminal justice system, and does not significantly contribute to a reduction in hung juries and retrials.

Because each member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints and community confidence in jury verdicts, and because the ABA's review of research and empirical data, as well as the consensus of the legal community, has concluded that the opposite occurs through the non-unanimous decision process, the ABA supports petitioner's request that *Apodaca* be revisited.

## ARGUMENT

### I. ABA STANDARDS AFTER 1976 AND ITS 2005 PRINCIPLE ON JURY UNANIMITY FOR CRIMINAL TRIALS SUPPORT RECONSIDERATION OF *APODACA*.

#### A. *Apodaca* Relied On The 1968 ABA Standards.

As petitioner explains, this Court's decision in *Apodaca* permitting non-unanimous jury verdicts in

state criminal trials was the product of an unusual combination of disparate positions, in which five Justices agreed that the Sixth Amendment requires unanimous jury verdicts, and eight Justices agreed that the Sixth Amendment applies in full to the states. See Pet. 8-12. Notwithstanding this agreement, Justice Powell's separate opinion, and thus this Court's judgment, concluded that the Constitution does not require states to convict by unanimous verdicts.

Justice Powell viewed the unanimity question as requiring "a fresh look at the question of what is fundamental in jury trial." *Johnson*, 406 U.S. at 376 (Powell, J., concurring in the judgment). Justice Powell determined that deviation from the constitutional standard of unanimity for federal convictions was appropriate in part because "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." *Johnson*, 406 U.S. at 377 & n.19 (citing *ABA Standards for Criminal Justice, Trial by Jury*, Standard 1.1 (Approved Draft 1968) (hereinafter "*1968 Criminal Justice Standards*"))).

In 1972, when *Apodaca* was decided, Standard 1.1 of the *1968 Criminal Justice Standards* provided, in pertinent part:

#### 1.1 Right to jury trial.

Defendants in all criminal cases should have the right to be tried by a jury of twelve whose verdict must be unanimous, except that where not barred by applicable constitutional provisions, the right to jury trial may be limited in one or more of the following ways:

\* \* \* \*

(d) by permitting less than unanimous verdicts, without regard to the consent of the parties.

In the Commentary to the 1968 Criminal Justice Standard 1.1, the Advisory Committee reviewed current thinking on jury unanimity and "concluded that the minimum standards should recognize the propriety of less than unanimous verdicts, as now permitted in six states." 1968 Criminal Justice Standards, *supra*, at 28.<sup>4</sup>

The *1968 Standards for Criminal Justice, Trial by Jury*, was but one volume – volume 15 – of the seventeen volumes that comprised the ABA's *Project on Standards for Criminal Justice*. In 1974, on the occasion of publication of a compilation of the "black letter" standards of all seventeen volumes, Chief Justice Warren E. Burger noted, "The Standards are a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." *Introduction: The ABA Standards for Criminal Justice*, 12 *Am. Crim. L. Rev.* 251, 252 (1974).

**B. By 1976, The ABA Had Concluded That Unanimous Juries Should Be Required In Criminal Trials.**

In 1976, however, another ABA commission, the Commission on Standards of Judicial Administration,

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<sup>4</sup> The 1968 Standard 1.1 and its Commentary are reproduced in full in the Appendix to this brief.

published its final draft of the *Standards Relating to Trial Courts* (hereinafter *1976 Judicial Standards*), in which its Standard 2.10 stated, in pertinent part, "The verdict of the jury [in criminal cases] should be unanimous."

In the Commentary to its 1976 Judicial Standard 2.10, the Commission acknowledged that this was an enlargement to the scope of the jury trial right stated in the 1968 Criminal Justice Standard 1.1 but concluded, "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, these qualifications [in 1968 Standard 1.1] appear to be both unnecessary and unwarranted by our legal traditions." *Id.* at 24.<sup>5</sup>

The *1976 Judicial Standards* were adopted at the ABA's Midyear Meeting in February 1976. In the course of their adoption, the ABA also authorized amendment to the *1968 Criminal Justice Standards* to conform to the *1976 Judicial Standards*, specifically affirming that, "[i]n criminal cases, the verdict of the jury should be unanimous." *ABA Summary of Action of the House of Delegates, Midyear Meeting, Report of the Commission on Standards of Judicial Administration*, at 18 (1976).

Accordingly, when the 1978 edition of Volume 15 of the *Standards for Criminal Justice* (hereinafter *1978 Criminal Justice Standards*) was published, its Introduction stated: "Incorporating the ABA Standards of Judicial Administration, this updated

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<sup>5</sup> The 1976 Judicial Standard 2.10 and its Commentary are reproduced in full in the Appendix to this brief.

standard [15-1.1] has been changed by deletion of . . . (1) recogni[tion] [of] the propriety of nonunanimous jury verdicts." *1978 Criminal Justice Standards*, Introduction at 15.4.<sup>6</sup>

Any support that the ABA's *1968 Trial Court Standards* had lent to a position that permitted non-unanimous verdicts had thus ended by 1976.

### C. In 2005, The ABA Reaffirmed Its Commitment To Unanimous Verdicts In Criminal Trials.

Throughout the next thirty-plus years, the ABA has continued to conclude that a unanimous verdict should be a fundamental part of a criminal defendant's right to a jury trial.<sup>7</sup> Most recently, in 2004, the ABA established the American Jury Project, the result of which was the promulgation of nineteen core jury trial principles that defined the ABA's "fundamental aspirations for the management of the jury system." *ABA Principles for Juries and Jury Trials*, Preamble, at 1 (2005) (hereinafter *2005 Jury Trial Principles*). Of these, Principle 4.B provides that "[a] unanimous decision should be

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<sup>6</sup> The 1978 Criminal Justice Introduction, Standard 1.1 and its Commentary are reproduced in full in the Appendix to this brief.

<sup>7</sup> See, e.g., ABA Standards Relating to Juror Use and Management (1983); ABA Standards Relating to Trial Courts (1992); ABA Standards Relating to Juror Use and Management (1993 update); and ABA Criminal Justice Standards (1996). Each is available from the ABA.

required in all criminal cases heard by a jury.” *Id.* at 21.<sup>8</sup>

The ABA’s long-standing position on jury unanimity in criminal trials is the result of its continuing and comprehensive study of the jury’s role in the criminal justice system. Based on accumulated experiences and empirical data, and the evolved consensus of the legal community, it is the ABA’s position that the “fresh look” authorized by *Apodaca* in 1972 has run its course.

## II. EMPIRICAL RESEARCH, WHICH IS THE HEART OF ABA STANDARDS, SUPPORTS RECONSIDERATION OF *APODACA V. OREGON*.

### A. The *Apodaca* Court Agreed On The Importance Of Thorough Jury Deliberations, Attention To Minority Viewpoints, And Community Confidence In Jury Verdicts.

Despite their differing opinions, every member of the *Apodaca* Court agreed on the importance of thorough jury deliberations, attention to minority viewpoints, and community confidence in jury verdicts. The plurality,<sup>9</sup> concurring, and dissenting

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<sup>8</sup> The 2005 *Jury Trial Principles*, Principle 4, and its Commentary are reproduced in full in the Appendix to this brief.

<sup>9</sup> The *Apodaca* plurality was joined by Justice Powell in deciding *Johnson*, making the opinion in that case one for the Court. *Johnson* involved a parallel issue but, because the trial in that case had preceded *Duncan v. Louisiana*, 391 U.S. 145

opinions disagreed, however, on the effect non-unanimous decision rules would have on the jury's deliberative process. Compare *Johnson v. Louisiana*, 406 U.S. 356, 361 (1972) (contending that jury members would not automatically and prematurely "cease discussion and outvote a minority" under a non-unanimous decision rule), and *id.* at 374 & n.12 (Powell, J., concurring in the judgment) (predicting that community confidence in jury verdicts would not diminish under a rule permitting non-unanimous verdicts, and that such a rule would "not substantially affect[]" the jury-trial protection), with *id.* at 388 (Douglas, J., dissenting) (warning that non-unanimous verdicts "diminish[]" the reliability of a jury"), and *id.* at 398 (Stewart, J., dissenting) (explaining that non-unanimous verdicts suppress consideration of minority viewpoints and "corrode[]" "community confidence in the administration of criminal justice").

Little empirical research on jury behavior existed when this Court decided *Apodaca* that might have confirmed or disproved these competing predictions. Since that time, however, extensive studies have been conducted that support reconsideration of that ruling.

When the ABA revised its Criminal Justice Standards in 1978, it explained that several changes

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(1968), the applicability of the Sixth Amendment was not in contention. The empirical assumptions expressed in the Court's opinion in *Johnson* therefore represent those of the *Apodaca* plurality as well as Justice Powell, who echoed these assumptions in his opinion concurring in *Johnson* and concurring in the judgment in *Apodaca*.

in the standards, including the shift to unanimous jury verdicts, were made “to reflect the experience gained in the past decade and new perspectives in the wide-ranging topic of jury trial.” *1978 Criminal Justice Standards, supra*, Commentary at 15.4. In its 2005 *Principles for Juries and Jury Trials*, the ABA discussed empirical studies showing that a non-unanimous decision process reduces the reliability of jury determinations, silences minority viewpoints, and erodes confidence in the criminal justice system. *2005 Principles for Juries and Jury Trials*, Principle 4.B Commentary, *supra*, at 22. Also in the 2005 *Principles for Juries and Jury Trials*, the ABA concluded that studies had demonstrated that another justification for non-unanimity – a reduction in hung juries and retrials – was overstated. *Id.* at 23.

In light of this amassed data, which shows that the non-unanimous process in criminal jury trials does not foster thorough jury deliberations, attention to minority viewpoints, or community confidence in jury verdicts, the ABA suggests that *Apodaca*’s holding should be reconsidered.<sup>10</sup>

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<sup>10</sup> This Court has been particularly receptive to empirical evidence when assessing the constitutional contours of the jury trial right. See *Ballew v. Georgia*, 435 U.S. 223, 231 n.10 (1978) (opinion of Blackmun, J.) (noting that social science research on jury size “provide[s] the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment”).

## B. Non-Unanimous Verdicts Reduce The Reliability Of Jury Determinations.

In the Commentary to Principle 4.B of the *2005 Jury Trial Principles*, the ABA concluded that empirical data had shown that non-unanimous decision rules materially alter jury deliberations and decrease the reliability of verdicts, stating:

Implicit in [the historical preference for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions — ones that address and persuade every juror. Empirical assessment tends to support this assumption. Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. . . . In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached.

2005 Jury Trial Principles, *supra*, at 22 (citing Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych. Pub. Pol'y & L. 622, 669 (2001)). See also Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1262, 1273 (2000) (citing empirical research demonstrating that "majority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable"); Reid Hastie et al., *Inside the Jury* 60 tbl.4.1 (1983) (finding that twelve-member

jurors required to reach a unanimous verdict deliberated for 138 minutes on average, whereas those required to reach an eight-member majority only deliberated for an average of seventy-five minutes). Further, research has shown that individual jurors are themselves less confident in the decisions they reach under non-unanimous decision rules. See Nemeth, *supra*, at 53; Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. Cal. Interdisc. L.J. 1, 41 (1997) (“[T]he existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict.”).

The ABA’s review of this and other research calls into question the *Apodaca* plurality’s 1972 conclusion that, from a functional standpoint, there exists “no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one.” *Apodaca*, 406 U.S. at 411 (plurality opinion).

### **C. Non-Unanimous Verdicts Allow Juries To Reach A Quorum Without Seriously Considering Dissenting Viewpoints.**

Empirical studies also do not support the *Apodaca* plurality’s prediction that dissenting viewpoints “will be heard” even under non-unanimous decision rules. *Apodaca*, 406 U.S. at 413 (plurality opinion); see also *Johnson*, 406 U.S. at 361 (“We have no grounds for believing that majority jurors . . . would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.”).

As the ABA found, "Unanimous verdicts [] protect jury representativeness – each point of view must be considered and all jurors persuaded." 2005 *Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 24 (citing Hastie et al., *Inside the Jury*, *supra*, at 45-58; Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L Rev. 2, 23 (2001); Dennis J. Devine et al., *supra*, at 669). The ABA also concluded that "minority jurors participate more actively when decisions must be unanimous." *Id.*

Researchers have found that, in contrast to the "deliberate, ponderous atmosphere" characteristic of deliberations of unanimous juries, "larger factions in majority rule juries adopt a more forceful, bullying, persuasive style," possibly "because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." Hastie et al., *supra*, at 112; *see also* Saks, *supra*, at 40 ("Compared to unanimous rule juries, quorum rule juries have been found to deliberate less equitably (that is, the distribution of talking is skewed more extremely, with the talkative jurors talking more and the untalkative talking less than in unanimous rule juries).").

Further, evidence indicates that women and racial minorities are particularly likely to hold dissenting viewpoints on juries and to have those opinions discounted under a non-unanimous decision rule. *See* Taylor-Thompson, *supra*, at 1264 ("If—as is often true—the views of jurors of color and female jurors diverge from the mainstream, nonunanimous decisionmaking rules can operate to eliminate the voice of difference on the jury."). As Justice Stewart

warned, "Under [*Apodaca* and *Johnson*], nine jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). In related areas implicating Sixth Amendment rights, this Court has stringently protected the participation of women and minorities on juries. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992); *Batson v. Kentucky*, 476 U.S. 79, 89 (1986).

Researchers also have found that permitting non-unanimous verdicts "discourage[s] meaningful examination of opposing viewpoints" and thus "impoverishes deliberations." Taylor-Thompson, *supra*, at 1264. Further, as panels are required to reach unanimity, "jurors at the extremes may be driven to a compromise, which they would otherwise reject, and a fairer verdict may result." 1996 Criminal Justice Standards, *supra*, Standard 15-1.1 Commentary, at 126 (citing Edwin P. Schwartz & Warren F. Schwartz, *Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules*, 80 Geo. L.J. 775 (1992)).

As then-Circuit Judge Anthony Kennedy recognized in 1978, unanimous decision rules facilitate deliberation by ensuring that dissenting voices are heard and accepted or rejected, thus lending "particular significance and conclusiveness to the jury's verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

## D. Non-Unanimous Verdicts Undermine The Community's Confidence In The Justice System.

Empirical evidence similarly undercuts Justice Powell's prediction in *Apodaca* that unanimous jury verdicts would not be "entitled to greater respect in the community." *Johnson*, 406 U.S. at 374 (Powell, J., concurring in the judgment). Instead, research has demonstrated that "[A non-unanimous decision rule] fosters a public perception of unfairness and undermines acceptance of verdicts and the legitimacy of the jury system." *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 22 (citing Taylor-Thompson, *supra*, at 1273). See also Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 Law & Hum. Behav. 333, 337-38 & tbl.1 (1988) (citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer); Barbara A. Babcock, *A Unanimous Jury Is Fundamental to Our Democracy*, 20 Harv. J.L. & Pub. Pol'y 469, 472 (1997) (the need to reach consensus promotes the credibility of the judgment because "[a] unanimous verdict is a major accomplishment and carries with it moral authority that a split decision lacks"); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 182 (1994) (unanimity serves as a "pillar of popular faith in the legitimacy and accuracy of jury verdicts").

As then-Circuit Judge Anthony Kennedy recognized in 1978, “[b]oth the defendant and society can place special confidence in a unanimous verdict.” *Lopez*, 581 F.2d at 1341.

### E. The Connection Between Unanimity And Hung Juries Has Been Overstated.

Justice Powell’s opinion in *Apodaca* suggested that eliminating unanimity requirements “could well minimize the potential for hung juries occasioned either by bribery or juror irrationality.” *Johnson*, 406 U.S. at 377 (Powell, J., concurring in the judgment). Studies of hung juries largely negate those concerns, however, and instead bolster arguments favoring unanimity.

The ABA’s research has shown that juries rarely hang because of one or two obstinate jurors. *2005 Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Taylor-Thompson, *supra*, at 1317). To the contrary, “[g]enerally, when deadlocks occur, they reflect genuine disagreement over the weight of the evidence and arise within juries that had substantial differences in verdict preference at the outset of deliberations,” *id.* (citing Paula L. Hannaford-Agor et al., *Are Hung Juries a Problem?*, National Center for State Courts (2002), at 7, available at [http://www.ncsconline.org/WC/Publications/Res\\_Juries\\_HungJuriesExecSumPub.pdf](http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesExecSumPub.pdf); Hastie et al., *Inside the Jury*, *supra*, at 166-67; and Saks, *supra*, at 41).

As other research shows, eccentric or irrational holdout jurors do not normally derail unanimity. Instead, “[t]he majority of hung juries in criminal cases in which unanimity is required do not reflect a

lone holdout or even two dissenters, but rather a more evenly divided final vote.” Diamond et al., *supra*, at 228. Juries tend to deadlock only when there is a “massive minority of 4 or 5 jurors” – rather than just one or two holdouts – at the beginning of the deliberative process, even if the number of dissenters is later reduced. See Kalven & Zeisel, *supra*, at 462.

Further, it is the complexity of the case that affects the likelihood of jury deadlock: one study found the incidence of hung juries to be ten percent in close, difficult cases, but only two percent in clear, easy cases. Kalven & Zeisel, *supra*, at 457. In fact, in a study of civil cases, the judges agreed with holdout jurors over forty percent of the time when a non-unanimous verdict was rendered, and disagreed with the jury in approximately twenty percent of the cases in which the verdict was unanimous. Diamond et al., *supra*, at 222. “[T]he agreement between the judge and the holdout jurors on a substantial number of cases suggests that the conflict on some of these juries posed precisely the kind of challenge to the majority position that a deliberative process should welcome.” *Id.*

Finally, research has shown only a small increase in the number of hung juries when jury unanimity is required: one survey of trial judges found that only 5.6% of criminal juries hang when unanimous verdicts are required, while 3.1% deadlock when majority verdicts are allowed. 2005 *Jury Trial Principles*, Principle 4.B Commentary, *supra*, at 23 (citing Kalven & Zeisel, *supra*, at 461). The costs of hung juries also are exaggerated, as shown by a study of California cases in which only twenty-six percent of cases in which the jury deadlocked

resulted in a retrial; all other cases were disposed of by guilty plea or dismissal. Leo J. Flynn, *Does Justice Fail When the Jury Is Deadlocked?*, 61 *Judicature* 129, 133 (1977).

As a recent comprehensive study of hung juries reported, eliminating unanimous decision rules for jury verdicts "would be unlikely to tap the true causes of hung juries: evidentiary factors, problematic deliberations, and juror attitudes about fairness." Hannaford-Agor et al., *supra*, at 7.

Because the ABA's review of research into the non-unanimous jury process does not even support a conclusion that it reduces hung juries, the ABA lends its support to the petitioner's request that *Apodaca* be revisited.

### CONCLUSION

For the reasons set forth above, the ABA respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

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SCOTT DAVID BOWEN,

*Petitioner,*

*v.*

STATE OF OREGON,

*Respondent.*

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**BRIEF AMICUS CURIAE OF  
THE CHARLES HAMILTON HOUSTON  
INSTITUTE FOR RACE AND JUSTICE,  
THE NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS, AND THE LOUISIANA  
ASSOCIATION OF CRIMINAL DEFENSE  
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## QUESTION PRESENTED

Whether the Sixth Amendment right to a jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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## INTERESTS OF *AMICUS CURIAE*

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.<sup>1</sup>

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with more than 12,800 direct members worldwide and 94 state, local, and international affiliate organizations with another 35,000 members - including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL's mission is to ensure justice and due process for the accused, to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.

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<sup>1</sup> Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified at least ten days prior to filing and have consented to the filing of this brief.

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.

*Amici* share a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon*, 406 U.S. 404 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee.

## SUMMARY OF THE ARGUMENT

Each of the *amici* filed separate amicus briefs in *Lee v. Louisiana*, 07-1523, urging the Court to revisit whether the Sixth Amendment requires unanimity in state criminal cases. This consolidated brief highlights the arguments contained in the respective *Lee* briefs, and reflects the collective belief of the undersigned *amici* that *Apodaca* was wrongly decided.

The Court should grant the Petition and overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), a fractured 4-1-4 opinion, which held that the Constitution does not compel unanimity in state criminal cases. The jurisprudential approach taken by the *Apodaca* plurality is out of step with the Sixth Amendment jurisprudence. While *Apodaca* focused on the functional role of the jury in a contemporary society, the Court has subsequently made clear that Sixth Amendment questions properly turn on the Framers' understanding of the jury trial right.<sup>2</sup>

Even setting aside methodology, *Apodaca* was wrongly decided because the plurality's assumption--that no functional difference exists between juries operating under a unanimity requirement and those operating under a 10-2 decision rule--is simply incorrect. Nearly four decades of empirical research on jury decision-making demonstrates conclusively

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<sup>2</sup> Cf. *State v. Gann*, 254 Ore. 549, 554 (Or. 1969) ("The decision that the Sixth Amendment requires a twelve-man unanimous verdict, was reached by a sterile historical approach to the Bill of Rights which is now -- and in our opinion very correctly -- usually ignored by the United States Supreme Court")

that unanimous juries are more careful, more thorough, and return verdicts that are more aligned with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict.

Moreover, recent historical scholarship indicates that one of the original purposes of the non-unanimous jury was to functionally silence the views of racial and ethnic minorities and women, and suggests that the current operation of non-unanimous juries *de facto* accomplishes that purpose. Eliminating the traditional unanimity requirement marginalizes the viewpoints of dissenting jurors because jurors in the majority refuse to deliberate further once the threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. Thus, non-unanimous criminal verdicts can undermine important Constitutional principles concerning equality in jury service that this Court has taken considerable measures to protect.

## REASONS FOR GRANTING THE WRIT

The Court has recognized that “[its] decisions interpreting the Sixth Amendment are always subject to reconsideration.” *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968); see also *Williams v. Florida*, 399 U.S. 78, 107 (1970) (Black, J., concurring in part and dissenting in part) (recognizing the Court’s “duty to re-examine prior decisions to reach the correct constitutional meaning in each case”). Because *Apodaca* is a fractured plurality opinion, and its result broke with literally centuries of well-settled common law precedent requiring unanimous criminal verdicts, the decision is particularly well-suited for reconsideration. The fact that forty-eight states require unanimity, with Oregon and Louisiana as the only two outliers, also suggests the need for review. See *Burch v. Louisiana*, 441 U.S. 130 (1979) (“We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.”).

Since this Court denied certiorari in *Lee v. Louisiana*, 07-1523, the Louisiana Supreme Court, in *State v. Chretien*, 2008 KA 2311 (03/17/2009), decided the question presented here, reversing a district court’s ruling that Article 782 of the Louisiana Code of Criminal Procedure (which permits non-unanimous verdicts) is unconstitutional. The Louisiana Supreme Court identified *Apodaca* as the still controlling precedent, and emphasized (correctly) that the task of reconsidering that decision rests with this Court: “[W]e are not

presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned . . .” *Id.* at 10. As *Chretien* appears to foreclose challenge to non-unanimity, further developments in Louisiana are exceedingly unlikely.

Further developments are equally unlikely in Oregon. Though the Oregon Court of Appeals opinion in Petitioner's case marks the first Post-*Apodaca* treatment of the unanimity issue in the state, the Oregon Supreme Court declined Petitioner's request for review. That court has repeatedly turned down well-preserved requests to consider the issue. *See, e.g., State v. Howard*, 344 Ore. 670 (Or. 2008); *State v. Cave*, A129267, *State v. Turneanu*, 2008 Ore. LEXIS 1158 (Or. 2008), *State v. Williams*, A131158, *State v. Artiago*, A137095 and *State v. Pereida-Alba*, A130594.

*Apodaca* is an anomaly in the Sixth Amendment jurisprudence; its concept is foreign to the Framers' understanding of the jury trial, it functions to the detriment of careful deliberation, and, in all likelihood, its operation muzzles the voices of disenfranchised and marginalized communities. Amici believe *Apodaca* to be anachronistic and outdated, but even if it is not, the Court should grant the Petition to reconsider the decision in light of the clear doctrinal and practical challenges it presents.

# I. *Apodaca* was Wrongly Decided.

## A. The CHHIRJ Brief Explains How Thirty-Five Years of Empirical Research Casts Grave Doubt on the *Apodaca* Court's Conclusion that No Functional Difference Exists Between Unanimous and Non-Unanimous Juries.

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson v. Louisiana*, 406 U.S. 356, 360-61 (1972), *Apodaca*'s companion case, rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply short-circuit deliberations and ignore the reasonable doubts of their colleagues. The Court concluded that before it would alter its own perceptions of jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported assumptions." *Id.* at 361-62; *cf id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

Subsequent empirical research on jury decision-making consistently undermines the view that non-unanimous juries protect the jury trial guarantee as well as unanimous juries do.

Unanimous juries are more thorough than non-unanimous juries. Studies demonstrate that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed. See Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 85 (1983). Non-unanimous juries also take fewer polls, tend to cease deliberation as soon as a quorum has been reached, and arrive at verdicts more quickly than unanimous juries. *Id.* at 76; see Devine et al. 7 Psych., Pub. Pol. & L. at 669 (summarizing numerous studies). This greater number of (and length of time between) votes is associated with what is known as an “integrative evidence-driven” deliberation style, while the shorter length of time between votes in the non-unanimous juries is attributed to the “discounting verdict-driven deliberation style.” Hastie et al., *supra*, at 90. Juries adopt the evidence-driven deliberation style most often in cases where the deliberative process – rather than the jurors’ pre-deliberation positions – drives the ultimate verdict. Devine, et al. *supra*, at 701.

Unanimity rules are also outcome-determinative. In almost one-third of the unanimous juries monitored in the Hastie et al. study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id.* at 96, 98. Almost 30% of the requests for information from the trial judge, one-quarter of the corrections of the evidentiary or legal errors made during deliberation, and over one-third of the discussions of the reasonable doubt standard occurred during the period after an initial eight-juror majority had been established. *Id.* Though a small, but statistically

significant increase in the number of hung juries results from the unanimity rule, a statistically significant number of "incorrect" verdicts results from the 10-2 majority rule. Hastie et al., *supra*, at 60.<sup>3</sup> The research suggests, then, that the unanimity rule's prevention of the "wrong" result from occurring offsets whatever minor costs incur from an increase in hung juries. *Id.*; see generally Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U.L. Rev. 201, 205-06 (2006) (noting the scant empirical evidence available to the *Apodaca* Court and concluding that "the benefits of unanimity outweigh its costs").

The proof of the pudding is in the eating: Jurors operating under a unanimity rule report being more satisfied with their deliberations and more confident that they reached the correct result, while non-unanimous juries report lower ratings of the performance and decision processes of the other jurors. Hastie et al., *supra*, at 76, 82; Shari Seidman Diamond, et al., *supra*, at 205. Perhaps most importantly, unanimity rules enhance the perceived reliability and legitimacy of criminal verdicts. *Id.* at 222, 227 (citing research indicating that "community

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<sup>3</sup> First-degree murder was the "wrong" verdict. Though picking the "right" verdict is impossible, second-degree murder was considered the "right" verdict because it was the verdict delivered at the original trial, and legal experts who viewed the reenactment largely agreed that second-degree murder was the proper verdict. Hastie et al., *supra*, at 62. The three hung juries under the unanimity rule would have also delivered the "wrong" verdict if the majority faction had prevailed. Hastie et al., *supra*, at 63.

residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures”).

**B. The LACDL Brief Documents the Ignoble History that Colors the Use of Non-Unanimous Juries in Louisiana and Raises Concerns that Non-Unanimity Rules Marginalize the Views of Racial and Ethnic Minorities and Women.**

**i. The Use of Non-Unanimous Juries in Louisiana has an Ignoble Past.**

Louisiana’s 1898 Constitution, like the Alabama Constitution of 1901 previously examined by the Court, “was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.” *Hunter v. Underwood*, 471 U.S. 222, 229 (1985). In his opening address at the 1898 Louisiana Constitutional convention – the same convention that adopted various Jim Crow provisions specifically intended to limit African American participation in the democratic process and to “perpetuate the supremacy of the Anglo-Saxon race in Louisiana” – the Convention President, Kruttschnitt, captured the tone:

I am called upon to preside over what is little more than a family meeting of the Democratic party of the State of Louisiana. We know that this convention has been called together by

the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"].

When discussing the provisions adopted to prevent African American suffrage, a like-minded delegate explained:

[T]he Supreme Court of the United States in the Wilson case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

Closing the Convention, Hon. Thomas J. Semmes stated that the "mission" of the delegates

had been "to establish the supremacy of the white race in this state." *Id.* at 374. In his closing remarks, President Kruttsehnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide what they would have wished: "universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. He went on to proclaim:

I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system that we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

*Id.* at 381.

The 1898 Convention substantially diminished the Sixth Amendment jury trial guarantee, and through non-unanimity rules, the elimination of misdemeanor juries, and the reduction of jury size for lesser felonies were said by their proponents to be driven by a desire to reduce costs, commentators have directly linked the diminution of the jury trial right to the general effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions, 1812-1874*, The Center for Louisiana Studies (1993), pp. 93-109.

ii. **Non-unanimity rules marginalize the views of racial and ethnic minorities and women.**

Although the Court has proscribed exclusion of people of color, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), and women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), from juries, research (as well as the aforementioned cases) indicates that a non-unanimous decision rule may contribute to the *de facto* exclusion of their viewpoints. Brief *Amicus Curiae* of the Charles Hamilton Houston Institute for Race and Justice at 12 citing Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000).

As the delegates at the 1898 Louisiana Constitutional Convention had to have grasped, discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. *See, e.g., State v. Cleattesm*, 07-272, 2008 La. App. LEXIS 816 (La. App. 5 Cir. May 27, 2008) (“[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes.”). Since only ten-out-of-twelve votes are needed to obtain a conviction, prosecutors minded to discriminate know that the inclusion of one (or two) token African-American juror(s) suffices. *State v. Collier*, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted) (“Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to Batson’s admonition that it was unacceptable to do

so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two.”<sup>4</sup>

Thus, as Justice Stewart warned, under *Apodaca*, “[ten] jurors can simply ignore the views of their fellow panel members of a different race or class.” *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); Dennis J. Devine et al., *supra*, at 669 (“Unanimous verdicts protect jury representativeness - each point of view must be considered and all jurors persuaded.”); *id.* (“minority jurors participate more actively when decisions must be unanimous.”). Moreover, even if minorities comprise more than two spots on any given jury, race and gender are negatively correlated with juror persuasiveness and deliberation performance. See Hastie et al., *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). See also Taylor-Thompson, *supra*, at 1298-99 (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). This means that even when minorities sit on a jury, there is an increased likelihood that women and people of color may end up being outvoted by the majority of a non-unanimous jury.

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<sup>4</sup> The potential for *de facto* silencing of minority viewpoints is not limited to Louisiana. Because white/non-Hispanic citizens comprise 80.5% of Oregon’s population, the average jury will consist of two or fewer minority jurors. Thus, under a 10-2 decision rule, the voices of ethnic and racial minority jurors can be safely ignored.

Despite the Court's significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender, *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Miller-El v. Dretke*, 544 U.S. 660 (2005); *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008), the evidence suggests that to the extent the views of women and people of color are marginalized within them, non-unanimous juries undermine these important constitutional principles.

**C. Non-Unanimous Decision Rules Diminish the Beyond a Reasonable Doubt Standard.**

Two years after *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968), which held that criminal defendants in state cases had the right to a jury trial, the Court held that the Due Process Clause of the Fourteenth Amendment protects the criminally accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). The *Winship* Court reasoned that the historic pedigree of the heightened standard of proof in criminal cases and the virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions "reflect[ed] a profound judgment about the way in which the law should be enforced and justice administered." *Id.* at 361-62 (quotation omitted). Because the criminally accused has an interest of "immense importance" and "transcending value" in his liberty and reputation at stake, the margin of error that exists in all litigation must be reduced as

to the defendant by placing on the prosecution the burden of persuading the fact-finder of his guilt beyond a reasonable doubt. *Id.* at 363-66.

With *Duncan* and *Winship* as backdrop, Petitioner *Apodaca* argued that non-unanimous verdicts in state criminal cases undermined the Sixth Amendment, which encapsulates the beyond a reasonable doubt standard, because unanimity gives substance to that standard. 406 U.S. at 406.<sup>5</sup> Despite the obvious interrelationship between the jury trial right and the beyond a reasonable doubt

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<sup>5</sup> In fact, the voters' pamphlet – distributed during the special election in which the Oregon electorate adopted the constitutional amendment that authorized the non-unanimous jury provision – explicitly endorses the non-unanimous jury verdict as an effective means to circumvent the stringent beyond a reasonable doubt standard:

The laws of Oregon now prohibit the court from commenting on the fact that the accused in a criminal case has failed to take the witness stand and testify in his own defense, and the judge is also prevented from commenting on the value of the evidence introduced on behalf of the defendant no matter how flimsy the defense of the accused may be. Our laws also require that the evidence against the defendant must be so conclusive as to the culprit's guilt that the jury must be convinced beyond any reasonable doubt or to a moral certainty of that guilt before it is privileged to find a verdict of guilty. Twelve jurors trying a criminal case must be unanimous in their decision before the defendant may be found guilty. The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement.

requirement, the *Apodaca* plurality found "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412 (White, J.). More specifically, in *Johnson*, the majority held that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id.* at 360; *cf. State ex rel Smith v. Sawyer*, 263 Or. 136, 138, 501 P.2d 792 (Or. 1963) ("It clearly appears from the argument in the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions.").<sup>6</sup>

Within a very few years of *Apodaca* and *Johnson*, the Court began to re-examine the foundation of those decisions. In *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), for example, the Court held that conviction by a non-unanimous six-person jury in a Louisiana criminal trial for a non-petty offense violated the Sixth Amendment right of the defendant to a trial by jury. The *Burch* Court buttressed its determination by looking to the current jury practices of the several States:

[i]t appears that of those States that  
utilize six-member juries in trials of

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<sup>6</sup> As other *Amici* noted in *Lee*, "A common joke in Oregon among the defense bar is that if the classic *Twelve Angry Men* had been filmed there, it would have been a very short film indeed. This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. See, e.g., *Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting the beyond a reasonable doubt as the conclusion of 84% of the jury." *Lee v. Louisiana*, Brief Amicus Curiae of the Federal Public Defender for the District of Oregon, at 23.

non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

*Id.* (citations omitted).

*Burch* effectively rejected the subjective analysis embraced by *Apodaca* and *Johnson* and employed the "useful guide" that its predecessors eschewed. More recently, the Court rejected the *Apodaca* plurality's premise that the reasonable doubt standard was not tethered to the Sixth Amendment right to trial by jury. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

[i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

*Id.* at 278 (second emphasis added).

The Court concluded that by providing the jury with a faulty "reasonable doubt" definition during the instruction stage, the trial court denied defendant the right to a jury verdict of guilt beyond a reasonable doubt. *Id.* at 281. That deprivation amounted to "structural error," the Court concluded, because "the jury guarantee [is] a 'basic protectio[n]' whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281-82; *see also Cunningham v. California*, 549 U.S. 270, \_\_.; 127 S. Ct. 856, 863-64 (2007) (applying *Apprendi* to a state sentencing system and explaining that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence" (emphasis added)).

A defendant could not be convicted at common law except by "the unanimous suffrage of twelve of equals and neighbours" and on proof beyond a reasonable doubt. *Blakely v. Washington*, 542 US 296, 301 (2004) *quoting* 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). It cannot be true that when one (or worse, two) jurors have heard the evidence presented and believe that a reasonable doubt as to the defendant's guilt exists, the resulting conviction is based nonetheless on proof beyond a reasonable doubt.<sup>7</sup> Thus, if the scope

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<sup>7</sup> One argument made in favor of dispensing with the traditional unanimity requirement is that the unanimity rule allows an eccentric holdout juror to subvert the will of a principled majority. *See Shari Seidman Diamond, Mary B. Rose & Beth Murphy, Revisiting the Unanimity Requirement: The*

of the Sixth Amendment jury trial guarantee turns on the Framers' original understanding of the jury trial, non-unanimous verdicts cannot be tolerated and *Apodaca* cannot stand.

## CONCLUSION

Non-unanimous criminal verdicts in Oregon and Louisiana continue to undermine a critical portion of the Sixth Amendment's jury trial guarantee. This Court should grant the Petition and reverse *Apodaca*.

Respectfully submitted,

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*behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201, 204 (2006) (citing critics of unanimity who claim that quorum juries protect the jury from the "obstinacy of the erratic or otherwise unreasonable holdout juror") This concern is unfounded. See Shari Seidman Diamond, et al., *supra*, at 205 (finding no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views). Holdout jurors view the judge's instructions in much the same way as the majority jurors, and their recall of the testimony and of the elements of the offenses does not differ from that of the majority. Hastie et al., *supra*, at 149; See also Shari Seidman Diamond, et al., *supra*, at 220 (finding that holdouts and majority jurors largely agreed about the content of the evidence).

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In The Supreme Court of the United States

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SCOTT DAVID BOWEN,  
*Petitioner*

versus

THE STATE OF OREGON,  
*Respondent.*

On Petition for Writ of Certiorari to the  
Oregon Court of Appeals

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**BRIEF OF *AMICUS CURIAE* THE FEDERAL  
PUBLIC DEFENDER FOR THE DISTRICT  
COURT OREGON IN SUPPORT OF PETITIONER**

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The Federal Public Defender for the District of Oregon seeks leave to file as an *amicus curiae* on the Petition for Writ of *Certiorari*, whether a criminal conviction based on a non-unanimous jury poll violates the Sixth Amendment as applied to the States through the Fourteenth Amendment.<sup>2</sup>

The Federal Public Defender for the District of Oregon has a twenty-five year history of active representation of petitioners in actions pursuant to 28 U.S.C. § 2254, before the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. A significant portion of these actions involve convictions by non-unanimous jury polls, which is allowed in Oregon for all crimes save capital murder pursuant to the Constitution of the State of Oregon, Article I, Section 11 and Or. Rev.

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<sup>1/</sup> Pursuant to Rule 37.3, counsel for *amicus* states that the parties have consented to the filing of this brief; letters of consent from the parties have been submitted to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

<sup>2/</sup> *Amicus curiae* believe that the requirement for unanimity is grounded in the right to proof beyond a reasonable doubt based in either the jury trial protections of the Sixth Amendment or the Due Process protections of the Fifth and Fourteenth Amendments. Regardless of where the right is based, it is a fundamental component of the American system of justice.

Stat. § 136.450.<sup>3</sup>

The Federal Public Defender has several matters pending before both the district courts and the Ninth Circuit Court of Appeals raising the substantive issue of whether a deprivation of liberty based on a non-unanimous jury poll violates the Sixth Amendment to the Constitution of the United States presented in this matter, and additional procedural matters that are not presented here. Cases pending before the Ninth Circuit include: *Pickett v. Hall*, Ninth Circuit Case No. 07-35686 (fully briefed and pending argument); *Reedy v. Blacketter*, Ninth Circuit Case No. 08-35188 (same); *Remme v. Hill*, Ninth Circuit Case No. 09-35439 (in briefing stages). In addition, the Federal Public Defender undertakes continuing legal education exchanges with Oregon's State Public Defender's Office, which is actively pursuing the substantive question in appeals pending before the Oregon state courts and is counsel of record for Petitioner in this matter.

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<sup>3/</sup> As with other jurisdictions, the vast majority of criminal convictions in Oregon are pursuant to a guilty plea. Statistics made available by the Oregon Justice Department reflect that for the calendar year of 2007, there were a total of 37,716 felony cases filed in the State of Oregon, of which only 994 – 2.6% – proceeded through a jury trial. See [www.ojd.state.or.us/osca/documents/2007\\_Stats\\_Table\\_6\\_001.pdf](http://www.ojd.state.or.us/osca/documents/2007_Stats_Table_6_001.pdf). *Amicus curiae* are not aware of any statistics that are kept on the number of convictions that are based on a non-unanimous jury poll. Inquiry of criminal trial lawyers in the state, including with the public defender offices in the major metropolitan areas of Portland and Eugene, indicate that between one-third and one-half of all criminal convictions after a jury trial are through non-unanimous polls.

A ruling on the substantive issue will have direct impact on numerous cases pending before the federal and state courts in the district of Oregon.

#### STATEMENT OF THE CASE

*Amicus curiae* join the statement of the case presented by counsel for Petitioner. As noted in the petition, Oregon and Louisiana are the only two jurisdictions allowing individuals to be convicted of a crime by a non-unanimous jury poll. See Sheri Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006) ("jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon").

#### SUMMARY OF ARGUMENT

Depriving an individual of his liberty and freedom based on a non-unanimous jury poll is a violation of fundamental rights including the right to a trial by jury, to proof beyond a reasonable doubt, and to due process, as guaranteed in criminal trials in state courts by the Sixth and Fourteenth Amendments to the Constitution of the United States. *Amicus curiae* join the Petitioner's legal analysis on these issues, and as previously presented in the *amicus curiae* filing in support of the petition for writ of *certiorari* filed in *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536).

*Amicus curiae* writes to address why the

deprivation of an individual's liberty based on a non-unanimous jury poll is incompatible with the protections afforded by the Constitution of the United States, and particularly the rights guaranteed by the Fifth, Sixth and Fourteenth Amendments.

Based on this analysis, and that submitted by the Petitioner, *amicus curiae* join in urging this Court to accept *certiorari* and reaffirm our constitutional guarantee that no individual may be deprived of his liberty unless the state has "suffer[ed] the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'["] *Blakely v. Washington*, 542 U.S. 296, 313-314 (2004) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)).

## ARGUMENT

### I. The *Apodaca/Johnson* Analysis Regarding Non-Unanimous Juries Is Incompatible With This Court's Recent Jurisprudence.

Forty years ago, in *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968), this Court confirmed that the right to a jury trial in criminal cases guaranteed by the Sixth Amendment applied to state criminal proceedings through incorporation via the Due Process Clause of the Fourteenth Amendment.

Just two years later, petitioners from Oregon and Louisiana challenged the constitutionality of their criminal convictions, and attendant deprivations of their liberty, based on jury polls that were not

unanimous. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (*plurality*), *Johnson v. Louisiana*, 406 U.S. 366 (1972) (*plurality*). The cases were presented in two different procedural postures bracketing the decision in *Duncan*: *Johnson* predated, while *Apodaca* post-dated, that ruling. Note, *Non-Unanimous Jury Verdicts*, 86 HARV. L. REV. 148, 148-149 (1972).

Because of the timing, *Johnson* challenged the non-unanimity based primarily on the Fourteenth Amendment while *Apodaca* rested his contentions on the Sixth Amendment, arguing that unanimity under the Sixth Amendment was critical for giving meaning to the requirement for proof beyond a reasonable doubt.

As analyzed in Mr. Bowen's petition, the opinions in the cases were deeply fractured, resulted in no majority holding, and turned on the concurring opinion of Justice Powell. Justice Powell, writing for himself alone, concluded that while the Sixth Amendment guaranteed a right to a unanimous jury, this right was not wholly incorporated to the states through the Fourteenth Amendment regardless of the opinion in *Duncan. Johnson*, 406 U.S. at 366 (Powell, J., concurring).

As briefed in the petition for writ of *certiorari*, and in the previously presented *amicus curiae* filing in support of *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536), Justice Powell's analysis is inconsistent with subsequent majority holdings of this Court in *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S.

584 (2002), *Blakely v. Washington*, *supra*, and *Cunningham v. California*, \_\_ U.S. \_\_, 127 S. Ct. 856 (2007).

In these majority opinions, this Court examined the rights protected by both the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment. This Court concluded that the protections intended by our Founders included the right to require the state to "suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'" before depriving a person of their liberty. *Blakely*, 542 U.S. at 313-314 (quoting 4 W. Blackstone, Commentaries at 343).

Notably, in *Ring* this Court analyzed how these holdings could be reconciled with the Court's prior ruling in *Walton v. Arizona*, 497 U.S. 639 (1990), which also addressed the right to a jury trial. This Court ultimately concluded that "our Sixth Amendment jurisprudence cannot be home to both" *Apprendi* and *Walton*, and overturned *Walton*. *Ring*, 536 U.S. at 609-610.

*Amicus curiae* submit that the analysis which left standing non-unanimous juries in *Apodaca/Johnson* also can not be reconciled with this Court's Fifth and Sixth Amendment jurisprudence as enunciated in *Jones*, *Apprendi*, *Ring*, *Blakely* and *Cunningham*. Like *Walton*, the *Apodaca/Johnson* pluralities should be revisited and overturned.

## II. Deprivations Of Liberty Based On Non-Unanimous Jury Polls Are Inconsistent With The Protections Of The Fifth, Sixth And Fourteenth Amendment.

### A. A Trial By Jury with Proof Beyond A Reasonable Doubt Protects an Accused from Government Oppression and Unreliable Convictions.

America is unique in its recognition of a constitutionally protected right to a jury for any crime which would result in a deprivation of liberty. Ethan J. Leib, *A Comparison of Criminal Jury Rules in Democratic Countries*, 50 OHIO ST. J. CRIM. L. 629, 630 (Spring 2008) ("the United States offers the jury trial much more broadly to criminal defendants than other countries"); William L. Dwyer, *In the Hands of The People*, at xi (St. Martin's Press 2002) ("To visitors from abroad – even to some Americans – the jury is a surprising invention. . . . No other modern society has bet so heavily on the common man's and woman's good sense.")

The right to a criminal trial by jury has been one of the least controversial rights guaranteed by our Constitution: the right was included in the First Continental Congress's Declaration of Rights of 1774; of the twelve states that had adopted written constitutions prior to the Constitutional Convention, the right of a criminal defendant to a jury trial was the only right universally guaranteed; and the need to safeguard the right to a trial by jury was one of the "most consistent points of agreement between the

Federalists and the Anti-Federalists" at the Constitutional Convention. Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870-71 (1994). The right of an accused to a jury trial is recognized as necessary to "prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. at 155; *see also Apprendi*, 530 U.S. at 477-78 (discussing that the jury has historically been, and is perceived by the public as being, the last bastion between the criminally accused and the power of the state) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

While the jury stands between the accused and the government, the "beyond a reasonable doubt" standard both ensures that the jury will accurately fulfill its responsibilities when deciding the fate of an accused and encourages respect for, and confidence in, the jury's decision:

The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

As we said in *Speiser v. Randall*, *supra*, 357 U.S. [513], at 525-526, 78 S. Ct. [1332], at 1342 [(1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value — as a criminal defendant his liberty — this margin of error is reduced as to him by the process of placing on the other party the burden of \* \* \* persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of \* \* \* convincing the factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967).

Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in

doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

*In re Winship* 397 U.S. 358, 363-64 (1970).

The question becomes whether the jury can fulfill its fundamental functions when the opinion of a 2 of its 12 members – 16% – is deemed to be irrelevant.

**B. A Lack of Unanimity Fundamentally Alters Jury Deliberation in a Manner that Undermines the Constitutionally Mandated Role of the Jury.**

The lack of a unanimity requirement fundamentally impacts the conduct of a jury; empirical evidence documents that failing to require unanimity negatively affects the jury's deliberation process and the accuracy of its fact findings.

Studies of juries that were told they did not have to reach unanimity documented that the juries were less concerned about deliberation and more focused on quickly getting to a verdict; such juries refused to consider the merits of the minority view, they were likely to take the first formal ballot within ten minutes of being seated as a jury, and to continue

to vote often until they reached a verdict by the required number. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In marked contrast, mock juries that were told they had to reach a unanimous verdict delayed their vote until after they had discussed the evidence and rated their deliberations as both more serious and more thorough. *Id.* Other studies document that when unanimity is not required, the opinions of individual jurors are disenfranchised – and members of a minority or women are the most likely to be disenfranchised. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285-87, 1299-1301 (April 2000).

The lack of deliberation has a direct impact on the quality of the verdict. A lack of deliberation can negatively impact the verdict's accuracy. In one study, individuals called for jury duty were instead asked to sit as mock jurors, and viewed a video of a trial of a case that was intentionally designed by experts not to be sufficient as first degree murder, but instead of a lesser charger. Of the juries that had to deliberate until they reached unanimity, not one jury could reach a unanimous vote of first degree murder; of the juries that were allowed to reach a majority vote, 12% returned a verdict of first degree murder. *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1273. In short, the juries that had to be unanimous more accurately analyzed the evidence, those that did not have to be unanimous were less likely to do so.

The lack of deliberation also impacts the perception of the jury's role. Juries that are

unanimous report great satisfaction and confidence in their verdicts. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In contrast, the failure to consider the opinions of all jurors "could undermine public confidence in the fairness of the verdicts." *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1314.

C.      There Is No Justification for Allowing a  
Lack of Unanimity in Criminal Juries.

A primary reason for allowing non-unanimous juries is a contention that those who vote "not guilty" are unreasonable, hold-out, jurors simply seeking to cause a hung verdict. See Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998); Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

If such a concern was true, however, one would expect a plethora of hung juries in every jurisdiction that requires unanimity. There is no reason to believe that the individuals called to state jury service in Oregon and Louisiana are more unreasonable than those jurors called to serve in federal courts in the same jurisdiction, or into every other court in the nation both state and federal. As Oregon has about one-third to one-half of all felony trials decided by non-unanimous jury votes, logically one would expect that one-third to one-half of every criminal case in

jurisdictions requiring unanimity to suffer hung juries. In reality, hung juries are rare in all jurisdictions, with analyses finding only 2% of federal trials, and between 4% and 6% of state trials, ending in such verdicts. Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582-83 (Spring 2007); *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1287 n.150.

One study undertaken through the National Center for State Courts via a grant from the Department of Justice, found that less than 4.8% of federal trials between 1980 and 1997, and an average of 6.2% of state trials between 1996 and 1997, ended in hung juries. *Are Hung Juries a Problem?* at 19-25.<sup>4</sup>

While the authors of this research project considered utilizing non-unanimous juries as a solution, the recommendations rejected that option as not addressing the real problems causing hung juries – which was not unreasonable hold-out jurors:

But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes -- namely, weak evidence, poor interpersonal dynamics during

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<sup>4/</sup> Available at: [www.ncsconline.org/WC/Publications/-Res\\_Juries\\_HungJuriesProblemPub.pdf](http://www.ncsconline.org/WC/Publications/-Res_Juries_HungJuriesProblemPub.pdf).

deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to understand the evidence and law; and guidance for jurors about how to conduct deliberations.

*Id.* at 86.

Frequently when a jury is unable to resolve a case, it is because the jury started out significantly divided in their view of the case – not because of a lone, irrational, dissenter. *Standing Alone*, 40 U. MICH. L.J. REFORM at 570-71 (citing Denis J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-707 (2001)).

The Department of Justice's research confirms that allowing convictions by non-unanimous jury polls does not solve some non-existent problem of

unreasonable hold-out jurors, and cannot be justified on that basis.

Another justification cited for allowing non-unanimous juries is that majority vote is quite common in democracy – it is utilized in elections, legislative, and even in appellate judicial proceedings. See Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189-90 (1995). Why, then, would it not be reasonable for juries as well? Yet legislatures and judiciaries make prospective laws that bind everyone subject to that law, including the members of the legislature and the judiciary themselves. If the same or subsequent legislature, or different judicial panel, decides that the law was inappropriate or somehow mistaken, they can rectify their action by a new enactment. At no point is a legislature or judicial panel obligated to determine that their enactment is appropriate beyond a reasonable doubt – and few laws could be passed or decisions reached if that was the standard.

In marked contrast, the decision of a criminal jury impacts not them, but the defendant, and it cannot be revisited if the same jurors later doubt their decision. Further, the decision of a criminal jury controls the most fundamental interests guaranteed by our Constitution – life and liberty. The standard of beyond a reasonable doubt is required to protect these fundamental interests, and a majority rule is simply not compatible with that standard. *Winship*, 397 U.S. at 363 (beyond a reasonable doubt standard plays a “vital role” and is the “prime instrument for reducing the risk of convictions resting on factual error”); see

also Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (January, 1997).

- D. As a Mathematical Computation Can Not Be Placed on the Beyond a Reasonable Doubt Standard, the Automatic Rejection of the Opinions of 16% of a Properly Constituted Jury is Constitutionally Unsupportable.

Criminal juries in Oregon, as with all other jurisdictions, are selected from lists of qualified individuals who make up a venire. These individuals are then questioned to discern any bias or other basis to remove them for cause, and only after each side has exercised its peremptory challenges is the petit panel duly sworn to impartially consider the evidence and apply the law. After hearing all the evidence and instructions, the panel retires to deliberate and reach a verdict. In Oregon and Louisiana, however, the opinions of 2 out of 12 – or 16% – of these well qualified jurors may simply be ignored.

This Court has rightly refused to apportion a mathematical number for the “beyond a reasonable doubt” standard of proof. *See, e.g., Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting “beyond a reasonable doubt” as the conclusion of 84% of the jury. For such a system to pass constitutional muster under the Sixth and Fourteenth Amendments, this Court must determine that the doubts of these

16% of the jury are necessarily, and always, unreasonable. Neither history, logic, nor empirical research, support such a determination.

To the contrary, the empirical research confirms that, far from being unreasonable, hold-out jurors in both non-unanimous civil juries and mock criminal trial juries frequently took the same position as taken by the judges who heard the case. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 229-230. There is simply no support, either in empirical research or at common law, to believe that the doubts of 16% of a properly constituted petit jury panel are always unreasonable. As Justice Marshall wrote in dissent, joined by Justice Brennan, in *Apodaca/Johnson*:

The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

406 U.S. at 403.

A common joke in Oregon among the defense bar is that if the classic *Twelve Angry Men* had been filmed here, it would have been a much shorter film. Convictions based on a jury poll which is not unanimous are convictions attained based on a level of proof lower than beyond a reasonable doubt, and are therefore in violation of the guarantees provided by the Sixth and Fourteenth Amendments.

## CONCLUSION

For the reasons presented herein, *amicus curiae* join with petitioner in asking this Court to accept *certiorari* and determine whether the practice of depriving an individual of their liberty based on a non-unanimous jury poll is in violation of the protections afforded to an accused by the Sixth and Fourteenth Amendments.

Dated: May 27, 2009

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IN THE  
*Supreme Court of the United States*

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SCOTT DAVID BOWEN,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

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On Petition for a Writ of Certiorari to the  
Oregon Court of Appeals

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**BRIEF OF *AMICUS CURIAE* OREGON  
CRIMINAL DEFENSE LAWYERS  
ASSOCIATION IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

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## **Interest of Amicus Curiae<sup>1</sup>**

Amicus Curiae, Oregon Criminal Defense Lawyers Association, ("OCDLA") is a 1,281-member organization of attorneys, investigators and others engaged exclusively or primarily in criminal defense. OCDLA represents the interests of its members, the criminal defense bar, and criminal defendants, and provides education and training on criminal defense law and practice.

### **Summary of Argument**

In all federal courts and 48 states, a verdict in a criminal prosecution must be unanimous. That is not the case in Oregon and Louisiana. Scott David

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<sup>1</sup> The parties have consented to the filing of this brief.

Counsel of record for all parties received notice at least ten days prior to the due date of the amicus curiae's intention to file this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Bowen was convicted of eight serious sexual offenses by a jury vote of ten to two. He was sentenced to seventeen years in prison.

The state's case was based on the testimony of the victim, Mr. Bowen's fifteen-year-old runaway daughter. Because the verdict did not need to be, and was not, unanimous, the state's burden was easier to meet in this case than it would have been if Mr. Bowen had been charged with misdemeanors such as trespassing or disorderly conduct. Unlike the serious felony charges in this case, a misdemeanor requires the unanimous decision of a six-person jury to return a conviction.

OCDLA asks the Court to grant the writ of certiorari sought by Mr. Bowen, and to rule that a verdict in a criminal case must be unanimous. OCDLA joins in Mr. Bowen's arguments as to why this issue is appropriate for review by the Court, and why the Sixth Amendment right to a jury trial includes the right to a unanimous jury trial.

OCDLA, in filing this brief, has two additional points to add. First, to the extent that data is

available, most felony verdicts in Oregon are nonunanimous. Second, nonunanimous jury verdicts tend to reduce the state's burden at trial. The lowered burden means that a weak state's case is more likely to result in a verdict in a felony case than in a misdemeanor; in other words, an innocent person accused of a felony is in more jeopardy than an innocent person accused of a misdemeanor.

### **Argument**

Although the available data are limited, it appears that roughly two-thirds of Oregon felony trials resulted in non-unanimous verdicts. That is troubling, because convictions as a result of non-unanimous verdicts are also the result of a lower burden on the prosecution than the Bill of Rights imposes, and a lower burden than exists in federal courts and in 48 states.

Oregon does not keep systematic records of whether jury verdicts are unanimous. The Oregon Office of Public Defense Services ("OPDS"), which handles most of the state's indigent-defense appeals and administers the appointment of counsel in the

remainder, has compiled statistics from those felony cases which pass through that office.

662 felony appeals were referred to OPDS in 2007 and 2008, representing slightly less than half of the felony trials in Oregon during that time. The record reveals the jury's vote in 63% percent of those cases. Where the vote is known, the jury's verdict was nonunanimous 66% of the time. Three percent of cases resulted in hung juries. *On the Frequency of Non-Unanimous Felony Verdicts in Oregon, Report to the Oregon Public Defense Services Commission* (May 21, 2009). The report is also available online: <http://www.ojd.state.or.us/osca/opds/Reports/documents/PDSCReportNonUnanJuries.pdf> (last visited May 26, 2009.)

Of course, those are only the cases in which the defendant was convicted. Counsel for amicus believes, from speaking with other Oregon attorneys, that the percentages are comparable for acquittals, but the only available evidence is anecdotal and casual.

The nonunanimity requirement is significant because so many jury verdicts are, in fact, unanimous, and it is objectionable because it reduces the state's burden to prove its case. The Oregon constitutional provision permitting 10-vote verdicts in felony cases was adopted in 1934 by initiative. In construing that provision, the Oregon Supreme Court has held that, "[i]t clearly appears from the argument in the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions." *State ex rel Smith v. Sawyer*, 263 Or 136, 138, 501 P2d 792 (1963). In *Sawyer*, a felony criminal defendant sought a misdemeanor jury and a unanimous verdict.<sup>2</sup> In denying his request, the Oregon Supreme Court reasoned that the ten-person verdict in a felony case was an easier burden for the state than the unanimous six-person verdict the defendant sought.

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<sup>2</sup> Under Oregon law, a felony jury is twelve people and ten must agree to reach a verdict. Or. Rev. Stat. § 136.210, Or. Rev. Stat. §136.450. A misdemeanor jury is six people, and must be unanimous. *Id.*

It is not obvious at first glance that getting ten votes out of twelve would be easier than six votes out of six, but a simplified model of a jury's deliberation helps to illustrate the point. In this model, each juror will vote to convict 90 percent of the time, and the juror's votes are independent of one another. In spite of the obvious limitations of this model, it illustrates a significant difference between unanimous and non-unanimous juries.

Under this model, the likelihood of a particular verdict can be expressed as a problem of binomial probability. See [http://en.wikipedia.org/wiki/Binomial\\_probability](http://en.wikipedia.org/wiki/Binomial_probability). (last visited on May 25, 2009). A binomial probability is the probability of a series of independent events, each of which has two outcomes.

Using binomial probability, the chance of a guilty verdict in a misdemeanor case is easy to calculate; it is 0.9 (the chance that an individual juror will vote to convict) raised to the power of six (the number of jurors.) That works out to 0.53, or a fifty-three percent chance of a guilty verdict. Most of

the remaining outcomes would be a hung jury; under this model the likelihood of an acquittal would be 0.1 to the sixth power, or 0.000001 percent.

However, the likelihood of a guilty verdict in a felony case is higher. Although ten votes are required to reach that verdict, there are twelve jurors voting. The chance of a guilty verdict works out to 89 percent.<sup>3</sup>

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<sup>3</sup> Here is an abbreviated explanation of how to calculate the chance of a guilty verdict under this model. The chance of such a verdict is the sum of the chances of exactly zero votes to acquit plus the chance of one vote to acquit plus the chance of two votes to acquit. Any other number of acquittal votes is an acquittal or a hung jury.

The chance of zero votes to acquit is 0.9 (the chance of a vote for a conviction) raised to the twelfth power, (the number of jurors.) That's about 0.28, or 28 percent. (Probabilities are usually expressed as a fraction of one.)

The chance of exactly one vote to acquit is 0.1 (the chance of a vote for an acquittal) times 0.9 (the chance of a vote for a conviction) raised to the eleventh power, (the number of jurors voting to convict.) times twelve (the number of unique ways to divide the jury into one acquitting juror and eleven convicting jurors). That's about 0.37.

Obviously, the chance that a juror will vote to convict will depend on the juror's view of the other evidence in the case, the deliberative process, and any number of other things. But the model above supports the Oregon Supreme Court's holding in *Sawyer* that, under Oregon law, the state's burden is lighter in a felony case than a misdemeanor. *See also Johnson v. Louisiana*, 406 US 356, 381 (1972) (Douglas, J., dissenting) (observing that nonunanimous verdicts reduce the state's burden. By eliminating the voice of dissenting jurors, Oregon has also undermined the reliability of its jury verdicts.

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The chance of exactly two votes to acquit is 0.1 (the chance of a vote for an acquittal) raised to the second power (the number of jurors so voting) times 0.9 (the chance of a vote for a conviction) raised to the tenth power, (the number of jurors voting to convict) times sixty-six (the number of unique ways to divide the jury into two acquitting jurors and ten convicting jurors). That's about 0.23.

The three possibilities, added together, make about 0.89, or 89 percent.

## **Conclusion**

For the above reasons, and those in Mr. Bowen's petition for a writ of certiorari, OCDLA urges the Court to grant the writ of certiorari requested by Mr. Bowen, and to decide that the Sixth Amendment's right to a jury trial includes the right to a unanimous jury verdict.

Respectfully Submitted,

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